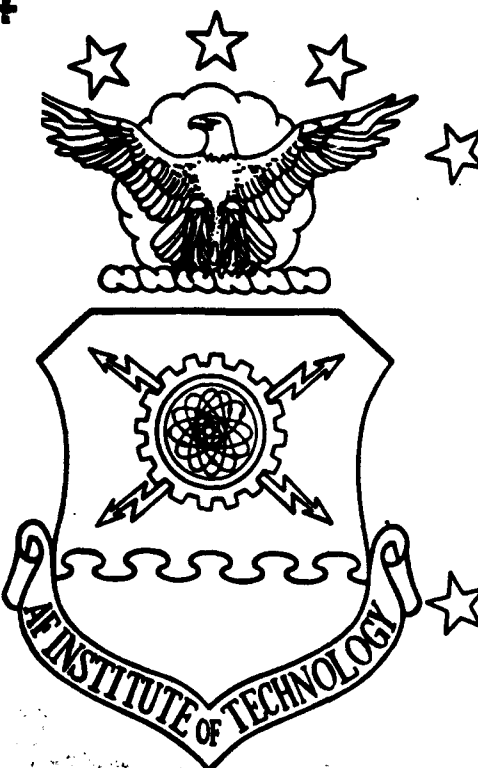


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AN ASSESSMENT OF FACTORS THAT
AFFECT THE EMPLOYMENT OF
ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES
TO RESOLVE CONTRACT DISPUTES

THESIS

Jeffrey T. Journey, Captain, USAF
Bradley T. Riddle, Captain, USAF

AFIT/GCM/LAR/94S-4

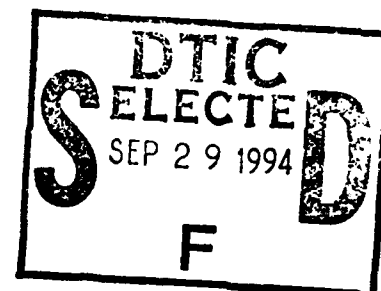
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DEPARTMENT OF THE AIR FORCE
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Wright-Patterson Air Force Base, Ohio

AFTT/GCM/LAR/94S-4



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**AN ASSESSMENT OF FACTORS THAT AFFECT THE
EMPLOYMENT OF ALTERNATIVE DISPUTE RESOLUTION
TECHNIQUES TO RESOLVE CONTRACT DISPUTES**

THESIS

**Presented to the Faculty of the Graduate School of Logistics
and Acquisition Management
of the Air Force Institute of Technology
Air Education and Training Command
In Partial Fulfillment of the
Requirements for the Degree of
Master of Science in Contract Management**

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September 1994

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Preface

The purpose of this study was to promote the employment of Alternative Dispute Resolution (ADR) techniques to resolve contract disputes. To this end, the research focused on empirically assessing factors that affect the employment of ADR by contracting and legal professionals. This assessment is needed to effectively develop and implement ADR policies and procedures for successful contract dispute resolution.

The research data was obtained via survey of ADR users in the U.S. Army, U.S. Army Corps of Engineers, and the U.S. Navy. These Department of Defense services were chosen because they are currently employing ADR techniques to successfully resolve contract disputes. The goal of this research was to learn from their experience so that other services and agencies may further enhance their ADR usage.

In accumulating the data and writing this thesis, we received assistance from a few world-class professionals. We are grateful to Dr. Robert Pappas for providing expertise and guidance on various research methods. We are also indebted to our other advisors and sponsors, Drs. Eileen Donnelly and Robert Strasser, professors of Contract Law at AFIT, who offered expertise, guidance and resources that were instrumental for successful completion of this research. To Faith Davis, we offer a special note of thanks for her cheerful administrative assistance. We also wish to thank the offices of the Chief Trial Attorneys for the U.S. Army, U.S. Army Corps of Engineers, and the U.S. Navy for their information and resource assistance. Finally, we extend our heartfelt thanks to our lovely wives, Emily and Carrie, for their love, patience and cheerleading through the completion of this thesis. In closing, we offer a simple prayer of thanks to God, for taking care of us, our wives, and our teammates throughout this AFIT thesis experience.

Jeffrey T. Journey

Bradley T. Riddle

Table of Contents

	Page
Preface	ii
List of Figures	v
Abstract.....	viii
I. Introduction	1
General Issue.....	1
Problem.....	4
Purpose	4
Investigative Questions/Research Objectives.....	5
Operational Definitions	5
Scope.....	8
Overview.....	8
II. Literature Review	10
Dispute Resolution Authority	10
Factors That Discourage Use of ADR.....	11
Unawareness	11
Lack of Incentive to Employ ADR.....	12
Oversight and Second-Guessing.....	12
Fear of Case Disclosure	13
Lack of Management Support.....	13
"Overbureaucratization"	13
Contracting Officers' Relationship with Others.....	14
Program Managers	14
Auditors	15
Attorneys	16
Literature Review Summary	16
III. Research Methodology	18
Research Design	18
Population	18
Sample Selection	19
Survey Recipients	20
Survey Design	22
Content Validity	22

	Page
Criterion - Related Validity	23
Drafting the Survey	24
Finalizing the Survey	25
Data Collection and Analysis	26
 IV. Data and Findings.....	 27
Survey Statistics	27
Presentation of Data	28
Relating Data to Each Investigative Question.....	29
Investigative Question 1	30
Investigative Question 2	44
Investigative Question 3	60
Investigative Question 4	78
 V. Recommendations and Conclusions.....	 96
Recommendation #1: Increase ADR Marketing	96
Recommendation #2: Enhance ADR Training.....	96
Recommendation #3: Increase ADR Incentives.....	97
Recommendation #4: Increase the Use of Partnering.....	97
Recommendation #5: Avoid Over-Regulating ADR Procedures.....	97
Recommendations for Further Research.....	98
Conclusion	99
 Appendix A: Survey	 100
Appendix B: Survey Respondent Demographics	107
Bibliography	110
Vita	112
Vita.....	113

List of Figures

Figure	Page
1-1. Responses to Question 1	30
1-2. Responses to Question 2	31
1-3. Responses to Question 3	32
1-4. Responses to Question 4	33
1-5. Responses to Question 5	34
1-6. Responses to Question 6	35
1-7. Responses to Question 7	36
1-8. Responses to Question 8	37
1-9. Responses to Question 9	38
1-10. Responses to Question 10.....	39
1-11. Responses to Question 11.....	40
1-12. Responses to Question 12.....	41
2-1. Responses to Question 14.....	44
2-2. Responses to Question 15.....	45
2-3. Responses to Question 16.....	46
2-4. Responses to Question 17.....	47
2-5. Responses to Question 18.....	48
2-6. Responses to Question 19.....	49
2-7. Responses to Question 20.....	50
2-8. Responses to Question 21.....	51

Figure	Page
2-9. Responses to Question 22.....	52
2-10. Responses to Question 23.....	53
2-11. Responses to Question 24.....	54
2-12. Responses to Question 25.....	55
2-13. Responses to Question 26.....	56
2-14. Responses to Question 27.....	57
3-1. Responses to Question 29.....	60
3-2. Responses to Question 30.....	61
3-3. Responses to Question 31.....	62
3-4. Responses to Question 32.....	63
3-5. Responses to Question 33.....	64
3-6. Responses to Question 34.....	65
3-7. Responses to Question 35.....	66
3-8. Responses to Question 36.....	67
3-9. Responses to Question 37.....	68
3-10. Responses to Question 38.....	69
3-11. Responses to Question 39.....	70
3-12. Responses to Question 40.....	71
3-13. Responses to Question 41.....	72
3-14. Responses to Question 42.....	73
3-15. Responses to Question 43.....	74
4-1. Responses to Question 46.....	78

Figure	Page
4-2. Responses to Question 47.....	79
4-3. Responses to Question 48.....	80
4-4. Responses to Question 49.....	81
4-5. Responses to Question 50.....	82
4-6. Responses to Question 51.....	83
4-7. Responses to Question 52.....	84
4-8. Responses to Question 53.....	85
4-9. Responses to Question 54.....	86
4-10. Responses to Question 55.....	87
4-11. Responses to Question 56.....	88
4-12. Responses to Question 57.....	89
4-13. Responses to Question 58.....	90
4-14. Responses to Question 59.....	91
4-15. Responses to Question 60.....	92
4-16. Responses to Question 61.....	93

Abstract

This study investigated the factors which potentially influence contracting and legal professionals' decisions to employ Alternative Dispute Resolution (ADR) techniques to resolve contract disputes. A literature review revealed that unawareness, excessive oversight, lack of management support, over-regulation, and interdisciplinary conflict of acquisition teams to be the most prominent factors discouraging the use of ADR. An additional background investigation determined that the United States Army, the Army Corps of Engineers, and the Navy had extensive experience and expertise regarding ADR. Therefore, surveys (over 250) were administered to various contracting and legal offices throughout these agencies, of which 57 were returned. The majority of the respondents indicated that except for unawareness, these factors imparted very little influence on their decision to employ ADR. Regarding unawareness, the data indicated a specific need for improvement in areas of training and publicity. For the training sessions, the respondents suggested ADR experts discuss the different types of ADR and under what circumstances to use them, as well as provide general guidelines for ADR implementation. With regard to publicity, the respondents indicated a need for more dissemination of "success stories" and "lessons learned" throughout their agencies in order to strengthen contracting and legal personnel's proficiency for employing ADR. Generally, the respondents indicated that the current dispute resolution environment is promoting the use of ADR to resolve contract disputes, and that its use will increase over the next few years.

AN ASSESSMENT OF FACTORS THAT AFFECT THE EMPLOYMENT OF ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES TO RESOLVE CONTRACT DISPUTES

I. Introduction

General Issue

A disturbing increase in civil litigation has swept through America over the last 30 years (White House, 1991:1). Gradually, this trend has overburdened the dockets of the Armed Services Board of Contract Appeals (ASBCA), and has lengthened the process time of settling contract disputes (Nash & Cibinic, 1987:31). The ASBCA was originally established to resolve claims expeditiously, informally and inexpensively outside of the federal court system (Babin and Cox, 1992:20). However, delays and formality in many ASBCA proceedings "have steadily increased" to a level comparable to the federal courts (1 CFR 305.86-3).

According to Colonel Riggs Wilks, Chief Trial Attorney for the Department of the Army, one of the most important issues in contracting today is "the time and expense of resolving government contract disputes" (Wilks, 1993:4). In the Air Force, historically 80% of the cases settled by litigation require between one and two years to be resolved at the trial level, and an additional two to four years if appealed (SAF/GC, 1993:7). As a result of the increase in process time, the cost associated with settlement has also increased. These costs include not only attorney and travel expenses, but also the costs of government and contractor acquisition teams focusing on dispute resolution for an extended period of time, and delaying productivity toward their primary mission (Harter, 1993:7). Another cost of lengthy litigation is the ill-will and distrust induced into the government-contractor relationship, which further inhibits timely and sound acquisition decisions (Harter, 1993:7). Overall, these issues have adversely impacted employees and

customers of contracting and legal communities, and have inspired efforts to develop a method of resolving contract disputes outside the current court process.

Perhaps the first government organization to respond to this litigation problem was the Administrative Conference of the United States (ACUS). ACUS is an independent federal agency which studies and develops administrative policy recommendations to Congress (Oran, 1991). The ACUS mission is "to improve efficiency, adequacy, and fairness in the procedures agencies use in carrying out their administrative programs" (Guide, 1983: Preface). For clarification, the term "administrative programs" includes processes of contract dispute resolution which are "not precisely covered by law or rules, and that require the use of professional judgment and common sense within the bounds set by the law" (Oran, 1991). ACUS addressed the issue of lengthy and costly litigation by submitting Recommendation 89-2 to Congress in June 1989. This Recommendation presented Congress with judicious ideas for more expedient and less costly dispute resolution (1 CFR 305.89-2), and laid the foundation for Congress to pass the Administrative Dispute Resolution Act of 1990 (ADRA). This Act encourages each federal agency to consider employing Alternate Dispute Resolution (ADR) techniques, in lieu of the current litigation process, when resolving contract disputes. The ADRA, 5 U.S.C. 581(3), contains the following definition of ADR:

Alternative means of dispute resolution is any procedure that is used, in lieu of an adjudication as defined in section 551(7) of this title, to resolve issues in controversy, including but not limited to settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration, or any combination thereof.

Soon after the passing of this Act, the Deputy Secretary of Defense, Donald Atwood, issued a memorandum which "urged" each defense agency to employ ADR in "appropriate cases" (DEPSECDEF, 1991). This memorandum was followed by another from the Secretary of the Air Force, Donald Rice, which emphasized the Air Force's commitment to employ ADR "to reduce the time and costs of settling disputes and

empower deciding officials to resolve issues of controversy more creatively and expeditiously." (SAF, 1993). Most recently, the Department of Defense General Counsel (DOD/GC) issued another memorandum to all service Judge Advocate Generals and legal advisors, stating that the Clinton Administration "is actively encouraging" all federal agencies to employ ADR, and further stated that "unfortunately, ADR has not received enough attention within the Department of Defense" (DOD/GC, 1994:1).

ADR techniques have already been employed by the Army, the Army Corps of Engineers, and the Navy; and frequently, their settlements have been reached at a fraction of the time and cost of traditional dispute resolution processes (Carr and DeLanoy, 1993). These agencies also have reported favorable relationships with the contractors following the settlement (Carr and DeLanoy, 1993). Additionally, a substantial number of commercial contractors are employing ADR (Gore, 1993:119). Initial data reveal ADR commercial case settlement rates between 50-90%, with process times substantially less than average litigation process times (SAF/GC, 1993: Tab 2).

So far, ADR techniques are not widely employed by the Air Force. However, in response to the initial positive results of ADR implementation coupled with the high level support for its use, the Secretary of the Air Force General Counsel (SAF/GC) developed a plan to systematically implement ADR into the Air Force's inventory of dispute resolution techniques (SAF/GC, 1993). The implementation plan describes how SAF/GC intends to introduce Air Force contracting officers, attorneys, and acquisition professionals to the concepts and techniques of ADR, and train them with a general, systematic approach to use ADR to settle contract disputes (SAF/GC, 1993).

In 1992, SAF/GC initiated ADR pilot programs at three different Air Force Bases to introduce training and awareness of ADR to Air Force personnel. In early 1994, SAF/GC also initiated a three-day ADR training course at the Air Force Institute of Technology (WPAFB, OH) to equip acquisition professionals with academic and process fundamentals of ADR. By successfully implementing and using ADR techniques to solve

contract disputes, the Air Force could save substantial time and money, and maintain positive relationships with contractors, just as other DOD and commercial activities have experienced.

Problem

Frankly, "many cases proceed to needless litigation that are in fact susceptible to prompt, direct resolution by contracting officers (COs) at an early stage" (1 CFR 305.89-2). Though initial data indicate that ADR is an effective tool for resolving contract disputes, and both the Executive and Legislative Branches of the Federal Government have encouraged its use in all departments, the Air Force has not widely employed ADR.

Purpose

The purpose of this research effort is to identify factors which impact ADR user's decision to employ ADR, and to measure the degree to which each factor influences that decision. To accomplish this purpose, the researchers began by citing the Federal Acquisition Regulations (FAR) to determine the most influential decision makers for employing the ADR process.

With regard to settling contract disputes, FAR 33.210 states, ". . .contracting officers are authorized, within any specific limitations of their warrants, to decide or settle all claims arising under or relating to a contract" Thus, contracting officers have *full* authority to settle contract disputes, and their decision is binding (FAR 2.101). However, FAR 33.211(a), and FAR 1.602-2(c) require contracting officers to obtain legal advice before reaching a final decision. Because of these regulations, the researchers deduced that the contracting and legal professionals are the key decision makers with regard to employing ADR, and are the primary users of the current ADR process. This deduction influenced the researchers to consider obtaining input from both contracting and legal

professionals in order to gain insight for developing an effective ADR implementation plan for the Air Force.

Upon completion of this study, the research findings will be reported to SAF/GC. When SAF/GC updates the Air Force's ADR Implementation Plan in late 1994, these recommendations will be available for their consideration, to help achieve the ultimate goal of expanding the use of ADR to resolve Air Force contract disputes.

Investigative Questions/Research Objectives

In order to capture data relevant to solving the problem, the researchers developed the following investigative questions to be answered in the data collection process.

1. To what extent do contracting and legal professionals believe management would support their decision to employ ADR?
2. To what extent do contracting and legal professionals believe sufficient guidance and counsel is available to assist them in an ADR case?
3. To what extent do contracting and legal professionals believe ADR will actually increase effectiveness in dispute settlement?
4. To what extent do contracting and legal professionals perceive any personal benefits or detriments initiating ADR for dispute settlement?

Operational Definitions

1. ADR Techniques (ADR Implementation Plan Draft Manual, 1993:14-21).

a. **Mediation.** A neutral third party, called a mediator or "neutral" assists the disputing parties in the dispute resolution process. Control over the resolution remains with the parties.

b. **Conciliation.** A third party called a "conciliator" gets the disputing parties talking again, breaks communication barriers between parties. Conciliator acts as a go-

between until the parties are able to negotiate with one another directly. Conciliator does not have to be totally neutral.

c. Negotiation. Perhaps the least formal of ADR methods, where parties meet together to exchange information without third party assistance, exercise cooperative decision making.

d. Facilitation. The third party, called a "facilitator" helps disputing parties define the disputed issues, set up a process by which information can be readily exchanged, and helps the parties develop a list of mutually acceptable outcomes.

e. Mini-trials. Each of the disputing parties designate a senior manager to represent their party and make binding commitments on its behalf. A neutral third party is not required, but advisable. This process is similar to litigation in court, only a judge is not present. However, attorneys are employed to fact-find, prepare their party's case, call witnesses to testify, and provide legal counsel. The senior managers then evaluate the strengths and weaknesses of their cases, and reach a settlement.

f. Early Neutral Evaluation. A neutral third party, usually an expert in the subject field, will review the cases and provide a written, non-binding evaluation of the strengths and weaknesses of each party's case. The parties will usually use this written evaluation as the basis for ADR, and hopefully settle promptly.

g. Fact-Finding. The disputing parties, perhaps with the assistance of a neutral with qualifications in the subject at hand, investigates the disputed issues, discovers the relevant facts, and presents them in a report to the parties. He also recommends a solution to the dispute if the parties agree, or parties can simply use his written report as a basis for negotiations.

h. Non-Binding Arbitration. Similar to a judicial process in that parties present their case to a third party called an "arbitrator," or a group of arbitrators, who render a non-binding advisory opinion. Cases may be presented by attorneys or technical representatives.

i. **Binding Arbitration.** Differs only from non-binding arbitration in that the parties have agreed that the arbitrator's decision will be final and binding.

2. **Agency.** a relationship in which a person acts or represents another by the latter's authority (Oran, 1991).

3. **Appropriate cases for ADR.** Per to SAF/GC's ADR Implementation Plan, one or more of the following circumstances in a dispute indicate ADR is a viable option: (1) the law of determinative legal issues is well settled; (2) the dispute is primarily factual; (3) the position of each side has merit, but its value is overstated; (4) no further discovery is required or limited expedited discovery will suffice for each side to assess its strengths and weaknesses; (5) avoidance of an adverse precedent is appropriate; (6) a speedy resolution is desirable; (7) the case lends itself to settlement before a board or court decision; (8) a strong presentation will give one side or the other a more realistic attitude about the case; (9) trial preparations could be costly and protracted; (10) a mediator could help diffuse emotion or hostility; (11) the evaluation of a neutral advisor could help break the stalemate; and (12) neither side really wants to litigate (SAF/GC, 1993: Tab 4).

4. **CFR.** (Code of Federal Regulations). The compilation of all the rules and regulations published by federal agencies. Updated each year, divided into subject areas (Oran, 1991).

5. **Counsel.** Advice or guidance from agency attorneys (Oran, 1991).

6. **Dispute.** A disagreement between parties about their rights or their legal obligations to one another (Oran, 1991).

7. **Inappropriate cases for ADR** Per SAF/GC's ADR Implementation Plan, one or more of the following circumstances in a dispute indicate ADR is **not** likely to be a viable option: (1) a definitive and authoritative decision is needed to establish a legal precedent; (2) the matter involves significant issues of government policy, and ADR will not assist policy development; (3) maintaining established policy and avoiding variations in decision is of special importance; (4) the matter significantly affects non-parties; (5) a full public record of the proceeding or resolution is important; (6) the agency must maintain

continuing jurisdiction over the matter with the right to alter the resolution as circumstances demand (SAF/GC, 1993: Tab 4).

Scope

This research is not intended to prescribe detailed procedures for implementing ADR to resolve disputes for the immense variety of government contracting agencies (1 CFR 305.86-3). Therefore, the scope of this thesis will not include a determination of what types of ADR techniques to employ in different contract dispute situations, specific guidelines to include in ADR Training Programs, or what other circumstances may be "appropriate" and "inappropriate" for employment of ADR. Additionally, this study does not attempt to develop an algorithmic model to predict behavior, nor offer an assessment of the "optimal" level of ADR use.

Overview

Chapter 1 has established the purpose of this research. The first chapter also presented the research team's investigative questions. These questions were designed to identify factors which influence contracting and legal professionals' decisions to employ ADR, and to assess the extent to which each factor influences those decisions.

Chapter 2 contains a summary of the literature reviewed to discover the views of this field's experts, to focus the research into quantifiable sub-elements, and to enable the research team to develop a sound methodology to capture data relevant to the problem.

Chapter 3 provides a detailed description of the research methodology. This chapter describes the rationale for selection of the method of data collection, the logic of the methodology in relation to the literature review, a description of the population of interest and the sample population, and a summary of how the data collection method was developed and tested. This chapter concludes by discussing how the researchers

determined the data would be valid, how the data were analyzed and summarized, and how certain assumptions can limit the conclusions.

Chapter 4 presents the findings with respect to the measurement and investigative questions, and summarizes the data indications and researchers' interpretations.

Finally, Chapter 5 presents the significance of the researchers' findings, offers practical implications of the results, and recommends follow-on studies and suggestions for replicating this research.

II. Literature Review

In an effort to promote increased use of ADR, the researchers conducted a literature review to identify factors which influence contracting and legal professionals' preferences to employ or not employ ADR. This chapter begins with an historical discussion of dispute resolution authority, continues with a presentation of factors that may discourage contracting and legal professionals from employing ADR, and concludes with a summary of what the literature review revealed to be the primary barriers to expanded use of ADR.

Dispute Resolution Authority

The mission of the contracting officer was established before America earned its independence from Great Britain. In the late 1700s, as our Republic's militia needed supplies and services to fight the Revolutionary war, professional acquisition personnel became essential elements of national defense (Bednar and Jones, 1987:14-15). Contracting officers were established as warranted agents of the Government who not only entered into and administered federal contract obligations, but also were responsible for resolving contract disputes (Bednar and Jones, 1987:21).

Today, the Federal Acquisition Regulation (FAR) defines a contracting officer as "a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings . . ." (FAR 2.101). Also, the Administrative Disputes Act of 1990 authorized the contracting officer to make the decision, with the contractor's consent, to employ ADR (Eaton, 1993:28). Thus, the contracting officer is vested by law with the authority to resolve contract disputes. However, FAR also requires the contracting officer to seek legal counsel before reaching his final dispute resolution decision (FAR 33.211(a), and 1.602-2(c)). Therefore, these references indicate that

contracting officers and attorneys are the most authoritative and influential people regarding the use of ADR.

Factors That Discourage Use of ADR

An extensive review of literature revealed several factors that discourage contracting and legal professionals from employing ADR. These multi-faceted factors include unawareness, lack of incentive to employ ADR, and "overbureaucratization." The following discussion presents the different facets of each of these factors, and summarizes their potential impact on expanding ADR use in the Air Force.

Unawareness. The first major factor, revealed by the literature review, which inhibits expanding ADR use, is the issue of unawareness. In 1990, Bednar noted that ADR was not well known by those responsible (i.e. COs, attorneys) for the resolution of contract disputes (1990:14). A more recent study indicated that among ADR users, unawareness of ADR authority and different ADR techniques was still a barrier to increased ADR use (Eaton, 1993:58). This same study concluded that ADR users distrust the ADR process because it is relatively new and unfamiliar (Eaton, 1993:28).

Because ADR is one of the most recent means of dispute resolution to be used by the federal government, training is essential for success. Training programs are invaluable in the breaking-in stage (Gibson and others, 1991:620). In its "Dispute Systems Design, Pre-Design Organizational Checklist," ACUS suggested that "ADR awareness training should be provided early in the process to promote acceptance and buy-in of the program" (1993:15). Additionally, Cathy Constantino, ADR program director for the Federal Depository Insurance Corporation, said 'buy-in' means individuals understand the benefits of ADR and how it can help agencies possibly obtain faster, cheaper and more satisfactory dispute resolutions (1994:45).

A final finding regarding unawareness: ADR users may not be willing to try ADR because they are not convinced of the time and cost savings claimed by ADR proponents.

This may be due to a lack of publicity and empirical data from which one could quantify actual ADR settlement time and cost savings compared to traditional litigation (Eaton, 1993:58).

For the past few years, ADR training has gradually been implemented to increase awareness. However, in light of the above, *recent* information, the researchers will attempt to assess the degree to which these elements of ADR unawareness discourage contracting and legal professionals from implementing ADR.

Lack of Incentive to Employ ADR. A second major factor which the literature review suggested to be a barrier to increased ADR use is a lack of incentive within the federal government to employ ADR. This issue is comprised of several facets, including oversight and second-guessing, fear of case disclosure, lack of management support, and "overbureaucratization."

Oversight and Second-Guessing. Oversight and second-guessing were also reported as common factors influencing CO's decisions. One study observed that "Government COs are constantly being second-guessed by their superiors. The superiors are constantly being second-guessed by political watchdogs. The level of accountability is very burdensome and causes constant delays" (Harter, 1993:46). One CO perceived that the risks associated with being second-guessed by Congressional or Inspector General inquiries, outweighed the rewards of expedient, inexpensive settlement (Harter, 1993:46).

Harter's study also indicated that many contractor representatives perceive government contracting officers as being risk-averse when making decisions that are not clearly provided for by the FAR (1993:46). Harter suggested that if COs choose to employ ADR to resolve a contract dispute, they are likely to face scrutiny and criticism from their superiors; but if they do not try ADR, they are likely to receive no criticism at all. These findings indicate that oversight and second-guessing can create a net disincentive for contracting and legal professionals to make out-of-court settlement decisions (Harter, 1993:45).

Fear of Case Disclosure. Bednar's study concluded that ADR users fear that employing ADR exposes each party to the risk of exposing their cases to the other disputant (1990:14). Eaton's study indicated a concern that ADR, if not used in "good faith," could be used by one party to "buy time," and probe the other party's case, in preparation for future litigation (1993:16). The researchers planned to determine the validity of these perceptions, and assess their influence on the employment of ADR.

Lack of Management Support. Bednar and Harter both suggested that ADR users, particularly in the contracting profession, were uncertain of the extent to which their managers encouraged and supported the use of ADR (Bednar, 1990; Harter, 1993). The researchers assessed that if the managers are not supportive of or proficiently familiar with ADR, it is not likely that a subordinate will attempt to employ it. This issue could relate to management "unawareness." However, without any conclusive, causal evidence between "management unawareness" and "management support" of ADR, the researchers will empirically test "management support" as a potential disincentive regarding the employment of ADR.

"Overbureaucratization." Another potential disincentive is "overbureaucratization." The decision making framework within the federal bureaucracy is constrained by legislation, policy, and over-regulation (Cook, 1989:2). Bureaucratization is defined as "the degree to which performance is governed by law, regulation, clerical routine, standard operating procedures, policy letters, or political factors" (Cook, 1989:19). Cook found that as the degree of bureaucratization increases within the decision framework, the less likely the contract manager is to employ an *optimizing* strategy, and more likely to employ a *satisficing* strategy (1989:56).

For clarification, Cook defined an *optimizing* strategy as a process in which a decision was made "after one considered every alternative, performed a cost/benefit analysis of each relevant decision criteria, then selected the single 'best' course of action" (1989:11). He defined a *satisficing* strategy as a decision made when one selected a

solution which was "just satisfactory, adequate, expedient, or 'good enough'" (Cook, 1989:14).

According to Cook, if the contracting officer (and perhaps even the attorney) considered ADR to be the optimal tool for settling a dispute, he would not choose ADR if he perceived the ADR process to be excessively governed by law, regulation, policy, and politics. In this case, "overbureaucratization" would inhibit the increased use of ADR. Therefore, the researchers attempted to determine if ADR users perceived the ADR process to be "overbureaucratized."

Contracting Officers' Relationship with Others. The third prominent barrier to increased use of ADR is related to the contracting officer's relationships to their cross-functional associates. Though vested with contractually binding and dispute resolving authority, federal COs do not act alone when trying to make optimal decisions; rather, they are members of a multi-functional acquisition team. Many see the CO as simply becoming a "conduit" for transmission of decisions by other functional representatives (Bednar and Jones, 1987:4). In the complex and highly procedural realm of government contracting, these various functional representatives tend to detract from the process that exemplifies the CO's decision making role (Harter, 1993:30). The review of literature identified three prominent functional representatives as having the most effect on contracting officers' decision making, and in particular, decisions regarding contract disputes. These include program managers, auditors, and attorneys. A discussion follows regarding the impact of these three main players on the CO's dispute resolution decisions.

Program Managers. Program managers within DOD have the overall responsibility for the success of their program. To accomplish this, they are delegated the authority to direct program team members (including engineers, financial managers, contracting officers) in activities directly related to the program objectives. Program managers generally do not have the authority to contractually bind the government, and as such, they rely on the program contracting officer for specific contractual advice and

binding authority. Because program managers' primary responsibility is the timely acquisition and fielding of systems, their concern regarding a contract dispute may be the adverse impact to program cost or schedule, rather than on reaching an optimal solution (Bednar, 1990:8). For example, if the program schedule is close to being compromised, the program manager may be interested in employing ADR, even if the contracting officer considers ADR to be inappropriate. Because program managers and contracting officers work closely together throughout the life-cycle of the program, this potential conflict could be a barrier to the use of ADR.

Auditors. A study noted that although the contracting officer holds ultimate decision authority, his discretion is "severely limited" by the administrative requirement to meticulously document and justify a decision which runs contrary to an audit report (Bednar and Jones, 1987:78). The role of the auditor is to act as an advisor to the contracting officer in contract cost and pricing issues. In practice, however, the advice of an auditor can carry great weight (Harter, 1993:43). The President's Blue Ribbon Commission on Defense Management studied the role of the DOD contracting officer and commented on the relationship between the contracting officer and the auditor:

The Committee acknowledges that the audit function is an important one in both the formulation and the subsequent administration of defense contracts. However, given the traditional, sound and generally applicable doctrine that the contracting officer is the sole government official with authority to take contractually binding actions, the auditor's role should be advisory to and functionally supportive of the contracting officer. (Bednar and Jones, 1987:9)

The Blue Ribbon Commission also found that the deterioration of the contracting officer's authority coupled with the apparent increase in the auditor's authority appeared to be a principal cause of inefficiency (1986:356). This study also noted (as Bednar and Jones did) that contracting officers were often reluctant to act contrary to an auditor's opinion because of concern about being subjected to criticism (1986:356). In fact, COs

must write a post-settlement memorandum for review by the IG if their decision goes against auditor's advice (Harter, 1993:43).

With regard to contract disputes, Harter reported that this situation "limits the contracting officer's ability to prevent and efficiently resolve disputes by adding hassle and paperwork" (1993:43). If a contracting officer believes ADR is the optimal dispute settlement strategy, but is concerned about an auditor's contrary opinion, he may choose to avoid the "hassle and paperwork," and not employ ADR.

Attorneys. As stated in Chapter 1, FAR 33.211 (a), and FAR 1.602-2(c) require contracting officers to obtain legal advice before reaching a final decision regarding disputes. However, because of their professional stature, agency attorneys can have a significant influence over COs decisions. Bednar's study presented evidence that COs tend to defer to the attorneys' advice and only act contrary to that advice in unusual circumstances (Bednar, 1990:7). Additionally, Harter found that antagonism between agency attorneys and COs often led to attorney involvement in contract disputes only *after* the disputes had escalated to the point where claims were inevitable, instead of at an earlier, more preventative stage (1993:44). Both of these potential scenarios may factor in to the CO's decision to employ ADR.

It is appropriate to note Harter's conclusion that "the more stakeholders . . . who 'lay claim' to a piece of the disputing territory, the more positional it becomes" (1993:28). Considering this information, along with the previous discussion of the impact others have on contracting officers, the researchers believe it is relevant to this study to determine the extent to which "stakeholders," such as the program managers, auditors, and attorneys, specifically affect the contracting officer's decision to implement ADR.

Literature Review Summary

The extensive review of literature revealed three multi-faceted factors which may inhibit the expanding implementation of ADR to resolve contract disputes. These factors

include unawareness of ADR, a lack of incentive in the federal government to employ ADR, and limited use of ADR due to the contracting officer's relationships with acquisition teammates. However, no empirical studies were discovered which assessed these factors' frequencies of occurrence or degree of impact on the contracting or legal professional's decision to employ ADR.

The researchers believe collecting empirical data could validate the observations of the previously referenced publications, and provide insight to the degree of influence each factor imparts on the contracting and legal professionals' decision to exercise ADR techniques. In addition, the researchers believe soliciting ADR implementation design recommendations from the ADR users would contribute to effectively promoting the use of ADR in appropriate cases.

The following chapter provides a description of the research methodology, which was designed to capture data relevant to answering the investigative questions. Additionally, the chapter describes how the measurement instrument was developed and tested, and discusses the validity of the assessed data.

III. Research Methodology

As previously established, one of DOD's latest initiatives is to expand the use of ADR. To support this initiative, the researchers identified several factors which impacted contracting and legal professionals decisions to employ ADR, and planned to measure the degree to which each factor influences those decisions. This chapter includes the rationale for this study's data collection method and sample population, then summarizes how the data were collected. The discussion concludes with an assessment of survey validity and the method of data analysis.

Research Design

The literature review revealed several factors that may influence contracting and legal professionals' decisions to employ ADR. This research attempts to explore and empirically validate those factors, and add to the existing body of knowledge.

This methodology will help answer *who* currently uses ADR techniques to resolve disputes, discovering *what* their opinions are regarding the current ADR process, and assessing *when* or *under what circumstances* ADR users would expand their use of ADR.

Population

The first goal of the methodology was to establish *who* currently uses ADR techniques to resolve contract disputes. The literature review revealed that ADR is used and encouraged in nearly all federal agencies that acquire goods and services, and that contracting and legal professionals are the prominent ADR users and experts. Because this study focuses on ADR use in the DOD, the population of interest includes those contracting and legal professionals working within DOD.

Additionally, through personal interviews with experienced ADR users (SAF/GC, AFIT Contract Law Department, ACUS, several law firms, and senior contracting, legal

and engineering professionals from the Air Force, Army, Army Corps of Engineers, and Navy), the researchers determined that within DOD, the Army, the Army Corps of Engineers, and the Navy have encouraged the use of and employed ADR in more cases than other DOD services. Thus, ADR users in these services became the target population for gathering data.

This research topic was discussed with the Chief Trial Attorneys from the Army, Army Corps of Engineers, and Navy, who gave permission to and encouraged the researchers to utilize their organizations for data collection. From consultation with these experts, the researchers determined that answering the investigative questions should be accomplished by obtaining inputs from both contracting and legal professionals with a basic understanding of ADR and/or who have actually used the process. Individuals meeting these criteria constitute the portion of the target population from which data will actually be gathered, and are referred to as the *sampling frame* of this study (Emory and Cooper, 1991:247). Respondents in the sampling frame were considered the most capable of providing beneficial inputs and insights for answering the investigative questions.

Sample Selection

Emory and Cooper note that the most important factor in determining sample size is the size of the population variance. The greater the variance in population, the larger the sample must be to provide estimation precision (1991:249). By limiting the sampling frame to identified ADR users in the Army, Army Corps of Engineers, and Navy, the researchers narrowed the population variance and reduced the sample size.

Upon establishing the sampling frame, the researchers next objective was to determine the number of responses necessary to adequately assess and answer the investigative questions. Considering data analysis, the researchers desire was to ensure at least a 90 percent confidence level that the results obtained for analysis were not due to sampling error. Through the literature review and personal inquiries with senior DOD

least a 90 percent confidence level that the results obtained for analysis were not due to sampling error. Through the literature review and personal inquiries with senior DOD contracting and legal professionals, the researchers estimated that the sampling frame population included 400 individuals. This research intended to capture *attribute data*, which include opinions, feelings, and perceptions from the sampling frame population. For attribute data, the appropriate sample size required to meet the desired confidence level (Emory and Cooper, 1991:258) is calculated below.

The authors proposed a 10 percent sampling error (σ_p) as adequate for this descriptive study. For this effort, the researchers had no conclusive information regarding the probable p value (the proportion of the population that has a given attribute). Thus, a p value of .5 is assumed (Emory and Cooper, 1991:258). And because $q = 1 - p$, the value for q (the proportion of a population not having a given attribute) is also .5. These values are used in the following equation to calculate the required sample size (n) (Emory and Cooper, 1991:258):

$$\begin{aligned}\sigma_p^2 &= pq / n - 1 \\ n &= pq / \sigma_p^2 + 1 \\ n &= (.5)(.5) / (.10)^2 + 1 \\ n &= 26\end{aligned}$$

This formula indicates that a minimum of 26 surveys from contracting respondents, and 26 surveys from legal respondents, would be required to attain a 90 percent confidence level for data analysis and interpretation.

Survey Recipients

Lists of potential respondents for data collection were provided to the researchers by the offices of the Chief Trial Attorneys for the Army, the Army Corps of Engineers, and the Navy. These individuals provided the researchers lists of potential respondents in

The lists indicated that potential respondents were located across the United States. With a required sample size of 52 (26 responses from both contracting and legal communities), and given the time constraints, the researchers concluded a mail survey to be the optimal communication mode. Mail surveys are effective measuring instruments for members of particular groups, such as ADR users (McClave and Benson, 1991:1121). Also with mail surveys, the respondents have more time to collect facts, discuss issues with others, and consider their replies at length (Emory and Cooper, 1991:333). Telephone interviewing was also considered for its attribute of probing respondents. However, with the required minimum of 52 interviews at an estimated 20 minutes each, as well as calls for scheduling, call-backs, and disconnects, the researchers concluded that time constraints made this method unfeasible.

In finding appropriate personnel to complete the survey, the researchers telephoned the contracting and legal personnel at each of the listed buying offices provided by the Chief Trial Attorneys. Nearly 40 individuals volunteered to distribute surveys to several (between 5 and 20) other office associates with ADR experience. Summing the number of surveys requested by each point of contact, the total number of potential respondents was nearly 220 -- 102 potential contracting respondents and 118 potential legal respondents.

Given that this method of survey distribution through these 40 points-of-contact would be less reliable than mailing each survey directly to the respondent, the researchers estimated a 30% response rate. Considering the desired 90% confidence level and sampling error constraints, the minimum number of surveys mailed to each profession (contracting and legal) was 87. Through the pre-contacted points-of-contact, the researchers mailed 130 surveys to the contracting communities, and 138 to the legal communities (for a total distribution of 268 surveys) The extra surveys were mailed to increase the probability of getting additional completed surveys beyond the minimum required.

Survey Design

The major considerations used in evaluating the adequacy of a measurement tool such as a survey are *content validity*, and *criterion-related validity*. (Emory and Cooper, 1991:179).

Content Validity. Emory and Cooper define *content validity* as the extent to which a survey instrument adequately addresses the topic of research (1991:180). The validity of this survey was assessed by the investigative questions, and confirmed through testing.

First of all, the researchers designed the investigative questions to offer specific insights to solving the problem, as stated in Chapter 1, of expanding the use of ADR in the Air Force. For example, investigative question number one asks: *To what extent do contracting and legal professionals believe management would support their decision to employ ADR?* The purpose of this question is to assess those intra-organizational factors that may discourage these professionals from employing ADR.

Investigative question number two asks: *To what extent do contracting and legal professionals believe sufficient guidance and legal counsel is available to assist them in an ADR case?* The goal of this question is to assess those factors and perceptions related to any existing support network outside the respondent's immediate organization that may discourage these individuals from employing ADR.

Investigative question number three asks: *To what extent do contracting and legal professionals believe ADR will actually increase effectiveness of dispute settlements?* The purpose of this question is to assess the perceptions of whether or not they believe ADR is a viable approach to dispute settlement. This question also measures the degree to which these individuals have been exposed to ADR success stories.

Investigative question number four asks: *To what extent do contracting and legal professionals perceive any personal benefits or detriments initiating ADR for dispute*

settlement? The purpose of this question is to assess perceptions of possible factors (such as settlement scrutiny, and IG investigations) that may discourage them from employing ADR.

The other way to assess content validity is through testing. The researchers submitted their survey to their research advisors at Air Force Institute of Technology (AFIT) and to Graduate Contract Management students, to review and respond to the survey. This helped determine if responses would actually contribute insights to answering the research questions. One research advisor instructs the AFIT Research Methods course and primarily reviewed the survey for format and design. The two other research advisors, ADR and Contract Law course professors at AFIT, primarily reviewed the survey for content validity. The inputs provided by the pre-testers enabled the researchers to revise and clarify survey question content and response structure to ensure the investigate questions were adequately answered.

Criterion - Related Validity. Criterion - Related Validity is another characteristic of a "good" measurement. Emory and Cooper note that this form of validity "reflects the success of measures used for some outcome or some empirical estimating purpose" (1991:181). In other words, given the measured data, how well can the researchers predict? There are four qualities from which to judge criterion-related validity for a survey. These qualities are relevance, freedom from bias, reliable, and available (Emory and Cooper, 1991:181). The following discussion summarizes these qualities as pertaining to this research.

Relevance: The researchers felt that the posed investigative questions were relevant to answering the problem, and corresponding measurement questions would directly assess contracting and legal professionals' perceptions of possible disincentives of employing ADR.

Freedom From Bias: The researchers suspected that the survey would allow each respondent a fair opportunity to respond honestly and completely. However, some bias is

likely occurred due to the differences in the respondents' experience with disputes, experiences with ADR, and various agency policies and practices.

Reliable: An instrument is considered reliable if it supplies consistent results over time (Emory and Cooper, 1991:185). The contracting and legal professionals' opinions and perceptions may change with time as ADR implementation and experiences increase. Because the objective of this research is to assess current perceptions, the researchers did not re-test. However, a follow-on study could assess any changes in perceptions over time.

Availability: The information required to address the investigative questions was readily attainable by having respondents answer the survey measurement questions.

Drafting the Survey

In designing actual survey questions, the researchers first decided how to capture the target data, which included respondents' attitudes, preferences and expectations of ADR. The researchers collected target data by designing each measurement question to contribute toward answering a specific investigative question. The survey also gathered administrative and classification data such as the respondents' organizations with which they work, job title, and experience. The survey was designed to be completed in less than 30 minutes, to maintain respondent interest and avoid survey "burn-out."

The survey instrument included both open and closed-ended questions. The closed-ended questions were included because of SAF/GC's interest in empirical data, and because no previous empirical studies on this topic were known to exist. The closed-ended questions were structured to measure attitudes and perceptions in relation to a five point Likert scale, with "don't know/not applicable as an additional option. Open-ended questions were included to encourage respondents to share their expertise and to provide inputs beyond the scope of the closed-ended questions.

Conversations with the Chief Trial Attorneys as well as the contracting and legal professionals revealed an overwhelming support for improving and expanding the ADR process. Therefore, the researchers benefited from openly stating the research objective. However, in the potential case where a respondent holds a "politically incorrect" view, he may be reluctant to disclose his true perceptions and opinions. To curtail the impact of this situation, the researchers formatted several questions "share your thoughts" and "do you agree or disagree," and "in which areas do you recommend improvement?" To encourage respondents to "open up" and honestly share information in-depth, the survey ensured confidentiality by not requiring identification.

Finalizing the Survey

Survey questions were grouped into four categories to capture information for the four investigative questions. For each category, the closed-ended questions were placed first, followed by the more complex open-ended questions. This sequence was designed to offer a variety of questions to maintain respondent interest and motivation, while minimizing frame of reference shifts.

In finalizing the survey, the researchers assessed the feedback from research advisor reviews and inputs from the content validity pre-test, and modified the survey appropriately. Feedback included assessments of completion time, question clarity and validity. In its final form, the researchers determined that the survey would capture data pertinent to answering the investigative questions, and offer insight to help solve the research problem.

Data Collection and Analysis

A key problem with the mail communication mode is non-response (McClave and Benson, 1991:1131). To help minimize non-response, the researchers encouraged respondent participation and emphasized its importance and credibility by attaching a cover letter to each survey, signed by the Head of the AFIT Contract Law Department. Approximately two weeks after mailing the surveys to the points-of-contact, a letter, endorsed by the researchers, was sent as a reminder to complete the survey, and thank them for participation.

Nearly three weeks after the response deadline passed, the data were analyzed using descriptive statistics. For the closed-ended questions, the mean and range of the Likert scale responses were reported graphically with histograms. A narrative analysis followed the histogram for each closed-ended question to provide insight as to consensus of opinions and perceptions of the respondents. The open-ended questions were analyzed by grouping and tabulating "like responses," which contained similar key words or concepts. This analysis of open and closed-ended questions provided the researchers with insight to answer the investigative questions, and make sound recommendations to effectively expand the use of ADR to resolve contract disputes.

This chapter addressed the methodology the researchers employed to obtain data to solve the problem stated in Chapter 1. This discussion included the rationale for the data collection method, the assessment of survey validity, and a brief overview of how the data were analyzed. Next, Chapter 4 presents the results of the data collected from the surveys.

IV. Data and Findings

This chapter presents the responses captured by the survey described in Chapter 3, and attempts to relate the data to the investigative questions established in Chapter 1. The researchers begin with a brief overview of survey statistics, and continue with a visual presentation and narrative interpretation of the captured data. The researchers then assess the information with respect to the purpose of this research, in an effort to form answers to the investigative questions.

Survey Statistics

While the actual survey demographics are presented in Appendix B, the reader should note the senior level of experience of the majority of respondents. Over 80% of the respondents had more than 15 years of federal acquisition experience, and over 80% managed an annual number of disputes from between four to more than 10. These data add credibility to the following responses and recommendations to improve the ADR process.

A total number of 28 contracting professionals and 29 legal professionals completed and returned the surveys. As stated in Chapter 3, the researchers established 26 responses from each profession as their goal. Because this goal was achieved, the following analysis could be conducted with the desired 90% confidence level. The researchers mailed 268 surveys, and received 57 responses, resulting in a 21.3% response rate.

This lower than expected response rate may be due to the survey distribution method, described in Chapter 3. The 268 surveys were mailed in groups of between 5 and 25 to nearly 40 "points of contact." These key people volunteered and were extremely helpful in distributing the surveys and "reminder letters" to their office mates. However, disconnects and/or lack of survey "ownership" between the points of contact and the

potential respondents may have contributed to the relatively low response rate. If the researchers had been able to personally contact and encourage each potential respondent, the response rate may have been higher. Nonetheless, the researchers received enough surveys to conduct sound analysis.

Presentation of Data

The responses to the survey are presented by means of histograms and narrative interpretations. Regarding the histograms, contracting and legal responses are graphed on the same chart for easy comparison and readability. The charts also illustrate the relative mean responses. Means were calculated by averaging the frequencies of "strongly disagree" to "strongly agree" (responses "1" through "5"). Because it was not always clear to the researchers whether a "Don't Know/Not Applicable" reply indicated a lack of knowledge or a belief that the issue was not applicable to the respondent, the "6" responses were *not* incorporated in the mean calculations (Emory and Cooper, 461,2). This prevented mean score inflation.

Following the chart for each question is a narrative presentation of the mean and standard deviation for each profession. The narrative includes percentages of the respondents who "agreed" with or "disagreed" with the question. The following example demonstrates how these percentages were calculated. In Question 1, 25 out of 28 contracting professionals answered "moderately agree" or "strongly agree." This equates to the ratio of 89%, which is presented as the percentage of contracting respondents who agreed with the statement of "Question 1." The visual interpretation from the histogram coupled with the narrative interpretation is designed to effectively convey the population's overall "feeling" regarding the survey question.

The reader should note that a narrative interpretation of the standard deviations and number of "6" responses was accomplished only when the researchers determined that

the data did not indicate a general consensus, as when the standard deviation exceeded 1.25 or the frequency of "6" replies exceeded 20% of the total profession's responses.

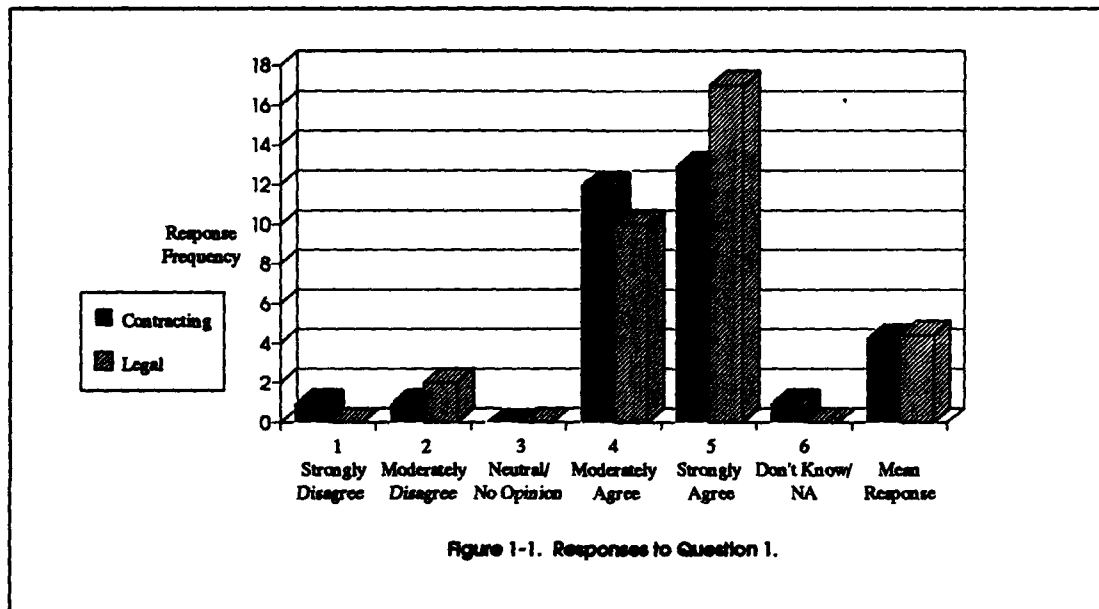
Relating Data to Each Investigative Question

As stated in Chapter 3, each survey question was designed to reveal insight to answer one of four overall investigative questions. Therefore, Chapter 4 presents the data in four sections - one for each investigative question. Each section begins by stating an investigative question, continues with the presentation of the related closed and open-ended survey questions and interpretations, and finally concludes with a summary of the insights gained from the survey responses, which contribute to answering the corresponding investigative question.

Investigative Question 1

The following questions were designed to help the researchers determine the extent users of ADR believe their management supports their decision to employ ADR.

Question 1: "Management understands the concepts of ADR."

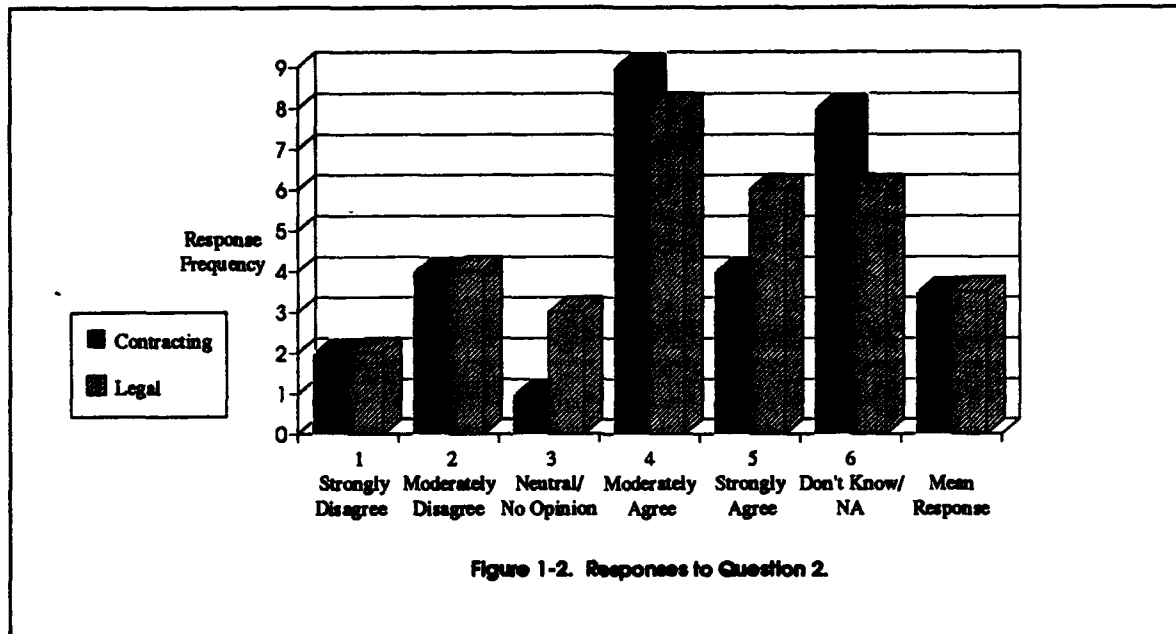


Contracting. Mean: 4.2. Standard deviation: .95. The data reveal 89% of the sampled contracting population agreed that their immediate supervisors understand the concepts of ADR.

Legal. Mean: 4.4. Standard deviation: .83. The data indicate that 93% of the sampled legal population agreed that their immediate supervisors understand the concepts of ADR.

The literature review revealed that unawareness of ADR procedures may be a factor limiting its use. The purpose of this question was to measure the extent to which the managers who use ADR understand its basic principles of and purposes for resolving contract disputes. In general, the survey responses suggest that managers in both the contracting and legal communities understand the concepts of ADR.

Question 2: "Management has received ADR training."



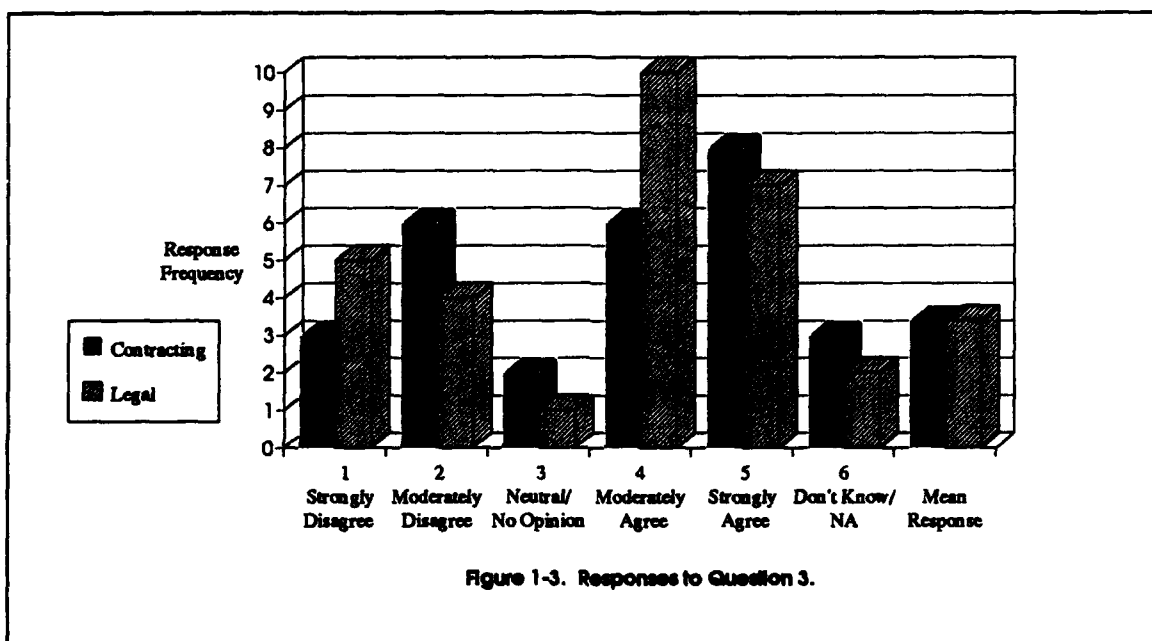
Contracting. Mean: 3.5. Standard deviation: 1.32. Responses reveal that nearly 48% of the sampled contracting professionals agreed that their supervisors have received ADR training. Nearly 29% of the respondents indicated they did not know the extent to which their managers had received ADR training. The researchers also noted the high disparity of responses, indicating a wide range of opinions in the sampled workforce.

Legal. Mean: 3.5. Standard deviation: 1.31. Don't Know/NA: 20.6%. Data are similar to that of contracting, in that nearly 48% of the sampled legal professionals agreed that their supervisors have received ADR training, with over 20% of the respondents giving "don't know" responses. The high standard deviation, as with contracting, indicates a wide range of opinions in the sample population.

This question complements Question 1, and further assesses the extent to which managers are aware of and comprehend the ADR purposes and procedures. The survey responses from both the contracting and legal communities reveal that less than half of the

managers had received ADR training. The majority of the respondents either disagreed that their management had received ADR training, or simply were not aware. Thus the data indicate that in general, managers have not been made aware of ADR through formal training.

Question 3: "Management has had actual experience using ADR."



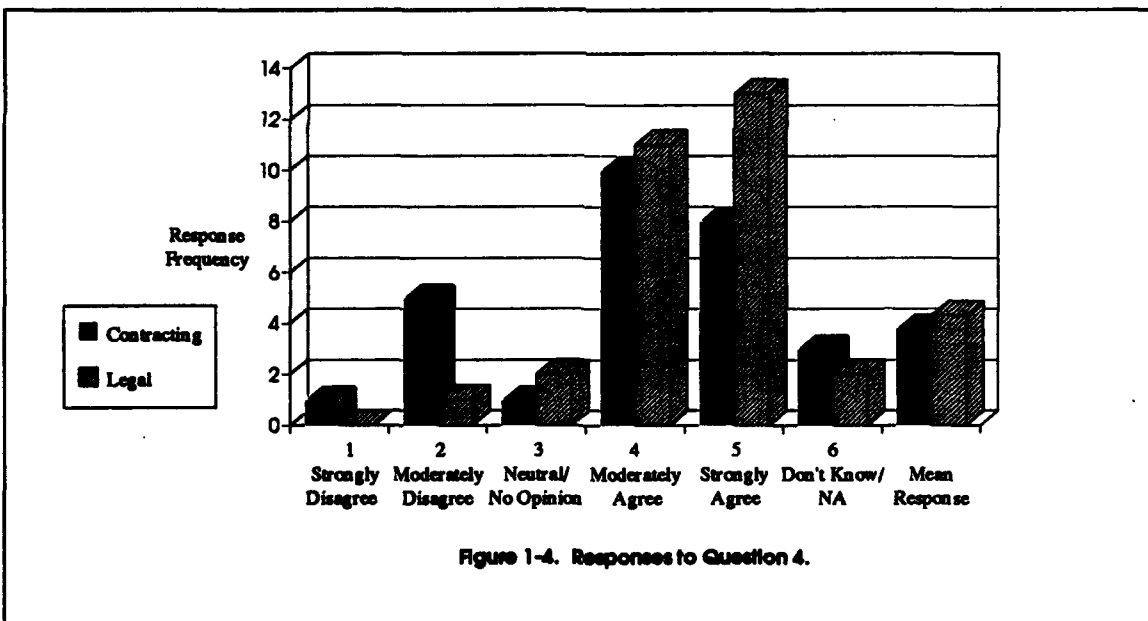
Contracting. Mean: 3.4. Standard deviation: 1.97. The data indicate 50% of sampled contracting community agreed that their supervisors have actual experience using ADR, while nearly 40% disagreed, held a neutral opinion, or believed this issue did not apply to their manager. The researchers also noted the wide disparity among responses, indicating that sample population opinion varies significantly.

Legal. Mean: 3.4. Standard deviation: 1.5. Responses reveal 58% of the sampled legal professionals agree that their supervisors have actual experience with ADR, while nearly 31% either disagreed, held a neutral opinion, or believed this issue did not

apply to their manager. As with contracting, these data also indicate a wide disparity among the population opinion.

The purpose of this question is to assess the level of experience and expertise among managers whose offices may use ADR. Responses will help the researchers assess level of management support for ADR. While the responses indicate more than half of the sample population has experience, the high standard deviation prohibits the researchers from concluding that the overall population believes that their manager has experience using ADR. .

Question 4: "Management has encouraged personnel in my office to use ADR."



Contracting. Mean: 3.8. Standard deviation: 1.23. The data indicate that 64% of the surveyed contracting population agreed that their supervisors encourage ADR. The 21% who disagree could indicate that supervisors either do not encourage ADR use, or actually discourage its use.

Legal. Mean 4.3. Standard deviation: .79. The data indicate that nearly 83% of the surveyed legal population agreed that their supervisors are encouraging use of ADR. Only 7% disagreed.

This question was included to help the researchers assess the extent to which ADR users are encouraged by their managers to employ ADR. The responses suggest that in general, ADR users are encouraged to employ ADR in appropriate situations.

Question 5: "Management has encouraged me to employ ADR."

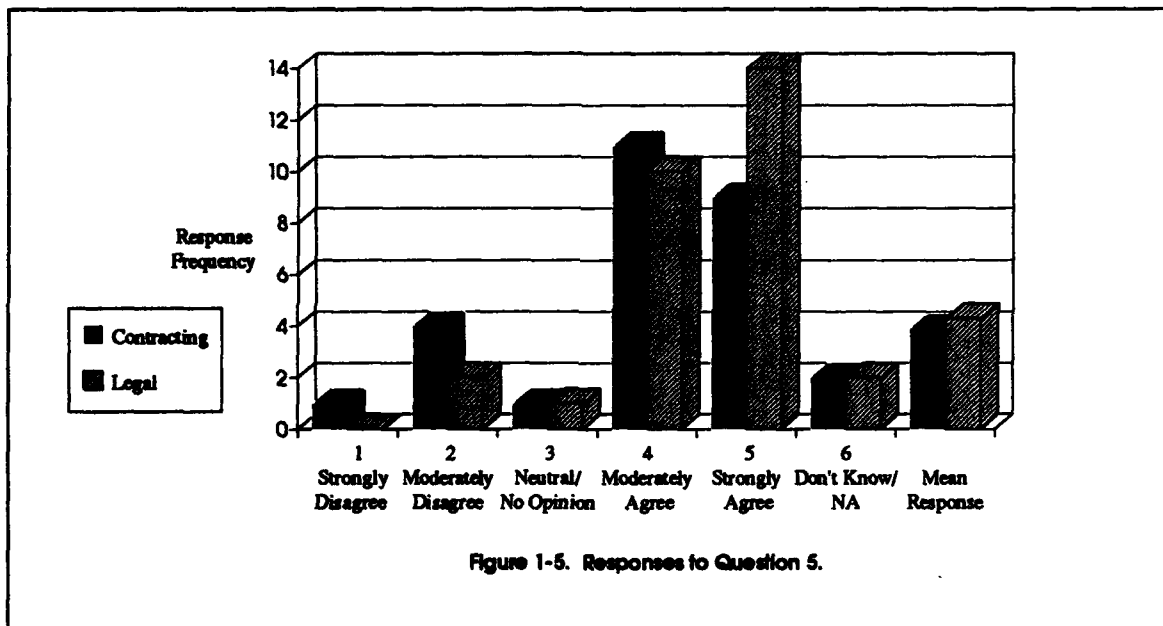


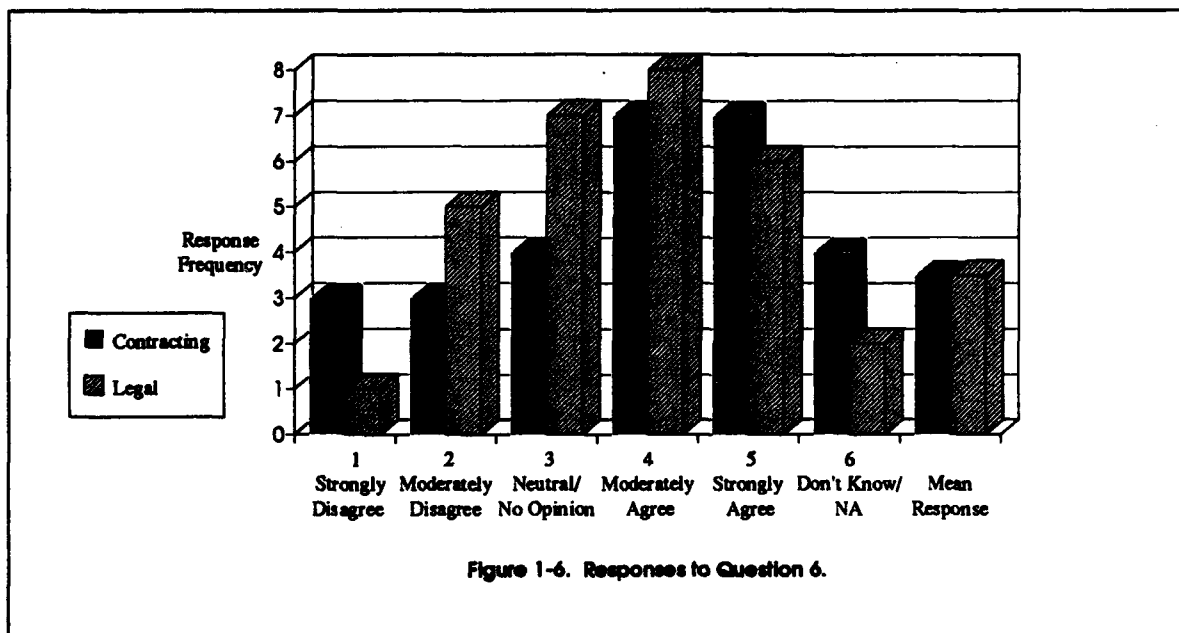
Figure 1-5. Responses to Question 5.

Contracting. Mean: 3.9. Standard deviation: 1.18. The data indicate that 70% of the sampled contracting professionals agreed that their supervisors are specifically encouraging them as individuals to employ ADR.

Legal. Mean: 4.3. Standard deviation: .88. The data indicate that 83% of the surveyed legal population agreed that their supervisors are specifically encouraging them as individuals to employ ADR.

The researchers designed this question to complement Question 4, which was presented to help determine if managers are encouraging implementation of ADR to their office as a whole, on a "macro" level. Question 5 then follows to assess the degree to which managers are taking personal interest in specific, potential ADR cases of each person in their office, and actually encouraging ADR implementation on a more "micro" level. The data for this question suggest that in general, supervisors are encouraging ADR to a greater extent than merely encouraging their "office" as a whole.

Question 6: "When considering whether or not to employ ADR, management offers me assistance."

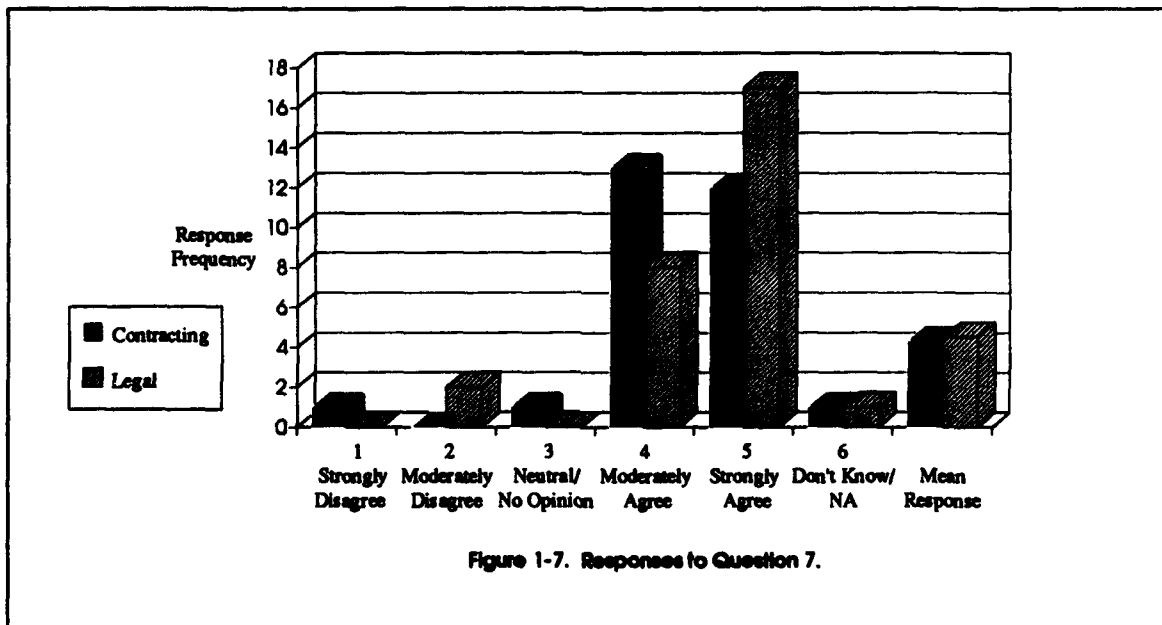


Contracting. Mean: 3.5. Standard deviation: 1.38. The data indicate that 50% of the surveyed contracting professionals agreed that their supervisor offers them assistance when making the decision to employ ADR, while 21% disagree or consider the issue to be not applicable.

Legal. Mean: 3.5. Standard deviation: 1.16. As with the contracting community, the data indicate that 51% of the legal profession agreed that their managers offered them assistance when making the decision to employ ADR, while 21% disagreed.

The researchers designed this question to help determine the extent to which supervisors are willing to assist their subordinates with their decision to employ ADR. The captured data yields insight to the level of management's general support of ADR. Because of the wide disparity of opinion in both the contracting and legal populations, the data do not suggest that the general population is receiving direct assistance from its management when deciding whether or not to employ ADR. The researchers realize that many of the respondents seek guidance from personnel other than their supervisors (refer to Question 14).

Question 7: "Management supports employing ADR."

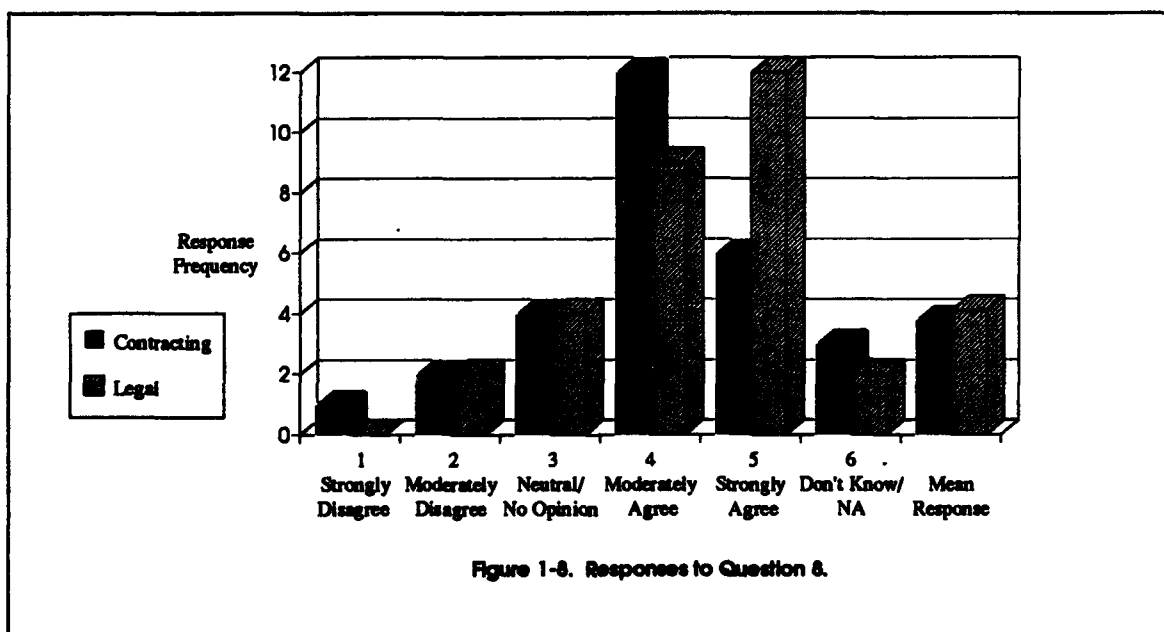


Contracting. Mean: 4.3. Standard deviation: .87. The data indicate that 89% of the contracting professionals surveyed agreed that their management supports the employment of ADR.

Legal. Mean: 4.5. Standard deviation: .84. The data indicate that 86% of the legal professionals surveyed agreed that their management supports the employment of ADR.

All of the questions included in Section I were designed to capture data relevant to this research question, to help assess the degree to which management in the contracting and legal communities support the implementation of ADR. The data suggest that the general population of ADR users is supported by their managers with regard to ADR employment.

Question 8: "Management supports sending personnel to get ADR training."

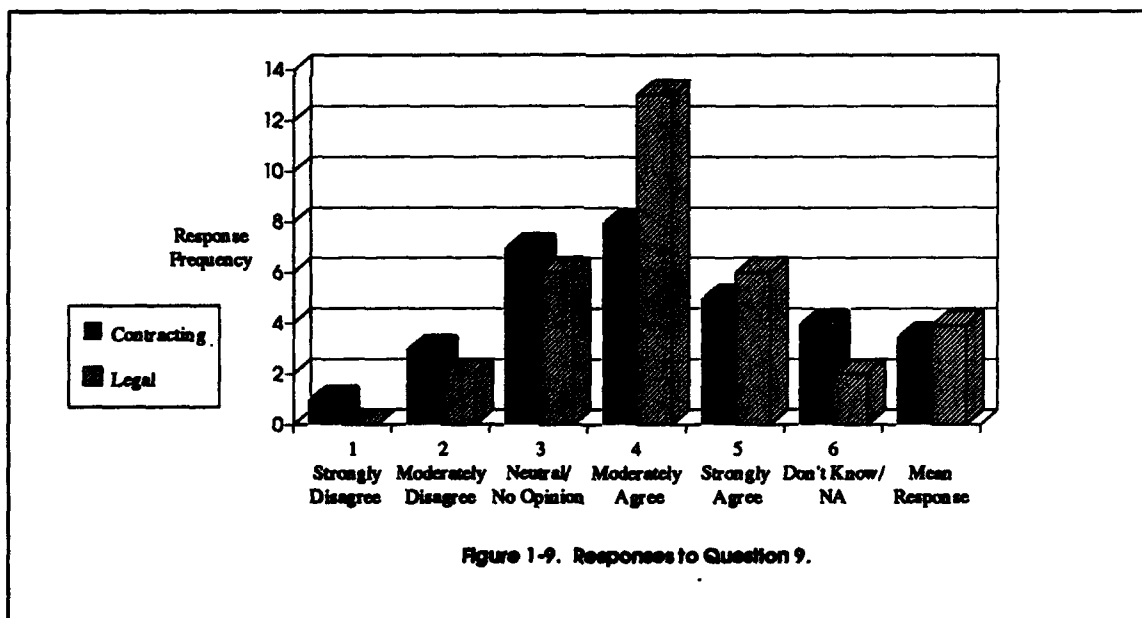


Contracting. Mean: 3.8. Standard deviation: 1.04. The data indicate that 64% of the surveyed contracting professionals agreed that their management supports sending subordinates to receive ADR training.

Legal. Mean: 4.1. Standard deviation: .95. The data indicate that 72% of the surveyed legal professionals agreed that their management supports sending subordinates to receive ADR training.

The purpose of this question is to assess the extent of management support of ADR by determining how many managers are willing to send their subordinates to a formal ADR training seminar, class, session, etc.. In both populations, it appears that managers are generally interested in training their subordinates to use ADR.

Question 9: "Management supports "in-house" ADR training."

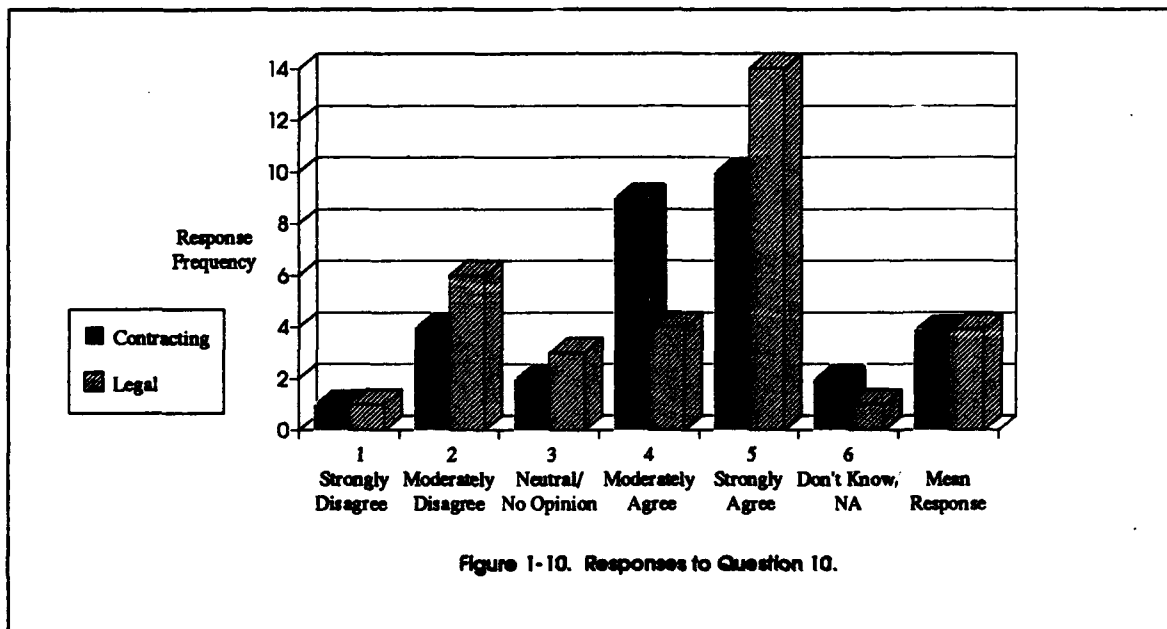


Contracting. Mean: 3.5. Standard deviation: 1.34. The data indicate that 46% of the surveyed contracting professionals agreed that management supports "in-house" ADR training.

Legal. Mean: 3.9. Standard deviation: .86. The data indicate that 66% of the surveyed legal professionals agreed that management supports "in-house" training.

The researchers designed this question to complement Question 8. In-house training requires a sacrifice of office personnel, space, and office supplies. Thus, the researchers believe that management's willingness to support "in-house" training for ADR could be an indicator of their level of support for ADR use. These data do not clearly indicate that managers support "in-house" ADR training.

Question 10: "Management supports candid feedback regarding ADR."

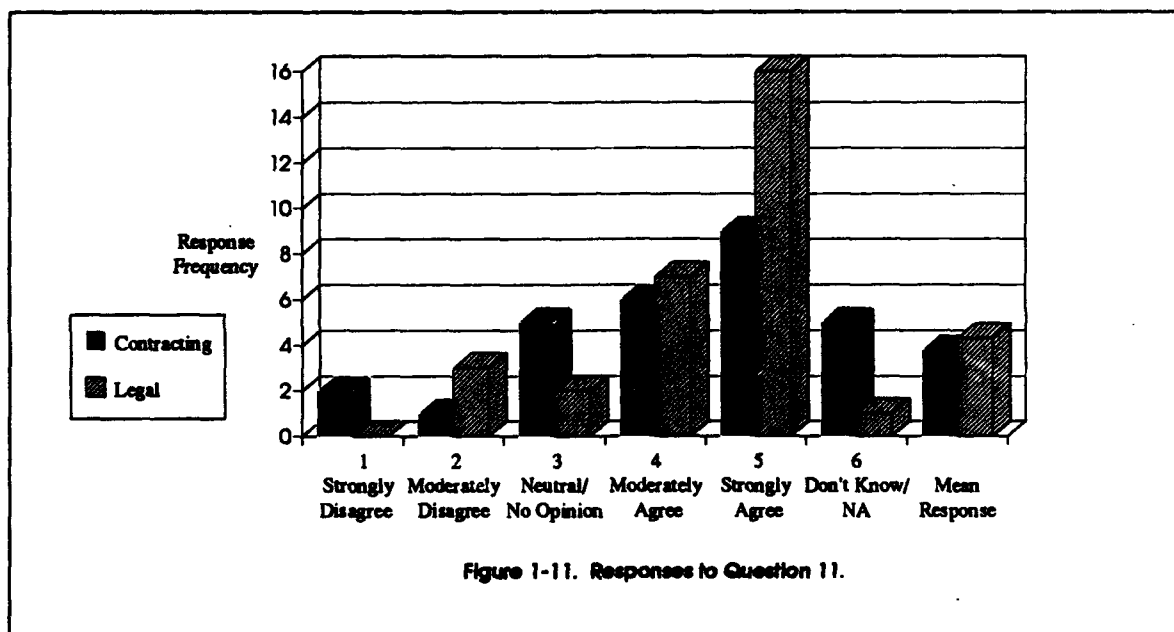


Contracting. Mean: 3.9. Standard deviation: 1.21. The data indicate that 64% of the surveyed contracting professionals agreed that their management supports feedback regarding subordinates' experiences with ADR.

Legal. Mean: 3.9. Standard deviation: 1.35. The data indicate that 62% of the surveyed legal professionals agreed that management supports feedback regarding subordinates' experiences with ADR.

The purpose of this question was to assess the extent to which managers are interested in obtaining "lessons learned" from their subordinates who settle disputes through ADR. While the data reveal over 60% of the managers in both contracting and legal are obtaining such feedback, the relatively wide disparity of population opinion indicates that a significant portion of the managers may not be interested in obtaining feedback from subordinates who employ ADR.

Question 11: "Management has publicly praised successful ADR use."

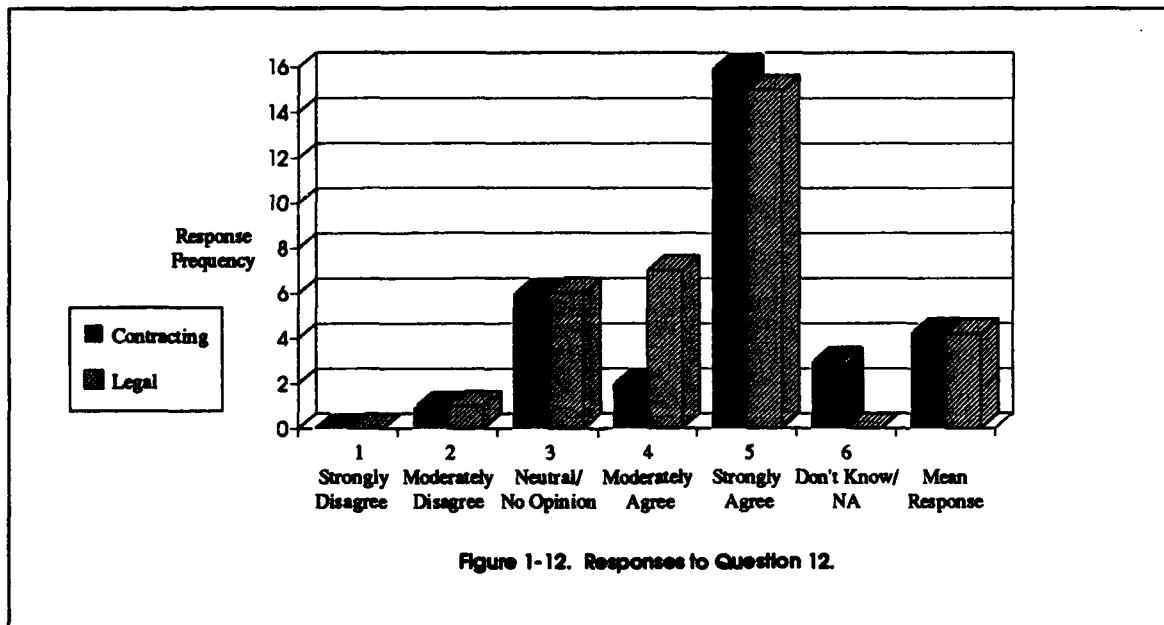


Contracting. Mean: 3.8. Standard deviation: 1.27. The data indicate that 54% of the surveyed contracting professionals agreed that their management has publicly praised successful use of ADR, yet the wide disparity of responses suggests that contracting managers are not prone to praise ADR implementation.

Legal. Mean: 4.3. Standard deviation: 1.01. The data indicate that 79% of the surveyed legal professionals agreed that their management has publicly praised successful use of ADR.

The purpose of this question was to assess the extent to which managers were indirectly encouraging the *expanded* use of ADR. The data suggest that contracting managers do not reward subordinates in front of their peers for employing ADR, while legal managers generally do.

Question 12: "ADR use will increase over the next two years."



Contracting. Mean: 3.8. Standard deviation: 1.27. The data indicate that 64% of the surveyed contracting professionals agreed that ADR use will expand over the next two years, while only 3.6% disagree.

Legal. Mean: 4.2. Standard deviation: .91. The data indicate that 79% of the legal professionals surveyed agreed that ADR use will expand over the next two years, while only 3.4% disagree.

The researchers included this question to "get a feel" of ADR users' overall impressions of ADR. In general, it appears that ADR users expect ADR use to increase.

The data suggest that ADR users believe ADR will become a more common tool to resolve disputes, and will not be soon forgotten.

Question 13: "Please share your thoughts regarding what action management and/or policy makers could take to encourage wider employment of ADR."

As stated in Chapter 1, the Air Force's goal is to expand the use of ADR to resolve contract disputes. This question was designed to reveal the sampled population's feelings regarding the current environment for employing ADR. The closed-ended questions revealed that managers are generally supportive of ADR, and that most respondents believe the use of ADR will expand. The following responses provide additional insight as to how to improve the current ADR process.

Ten responses indicated that management should receive additional training. A few of these respondents stated that managers need to understand all the different types of ADR, realize that ADR is not always appropriate, and not encourage ADR use to "jump on the bandwagon," or "punch the ticket." Other respondents added that management needed to be equipped with more formal ADR implementation procedures, and perhaps even consider ADR when establishing pre-solicitation objectives. Others stated that their managers needed more familiarity with dispute statutes, and obtain more ADR training funds for their offices.

By assessing these responses in concert with those of Question 2, it appears that, while the majority of the respondents' managers are sufficiently trained to use ADR, there is a need for more managers to be trained.

Four respondents indicated that ADR needed more publicity. They generally communicated a need for management to disseminate as much ADR information as possible, either by "word of mouth," or through literature. Specific recommendations included a need for publishing an ADR user source list, publicizing successful cases and lessons learned.

The literature review for this study did not specifically reveal "lack of publicity" as an inhibitor to expanding ADR use. This survey captured data which indicate a group of ADR users would appreciate learning about others' experiences employing ADR, from their management as well as from publications or directives.

Other responses related that management should implement changes to the ADR process. One suggested that ADR considerations be listed as part of a "dispute resolution checklist" for COs and attorneys, another recommended considering ADR earlier in the dispute process, while a third encouraged management to give maximum latitude to ADR users to reach settlement.

Two other miscellaneous comments included a concern for higher quality judges to preside over mini-trials, and a general comment for managers to remain "focused on ADR" throughout any adjustments to the ADR implementation process.

In assessing the responses to this question, it is important to note that less than half the surveyed population answered it. This may be an indicator that at least half of the managers in the surveyed community are doing a satisfactory job promoting the use of ADR, but that there is room for improvement.

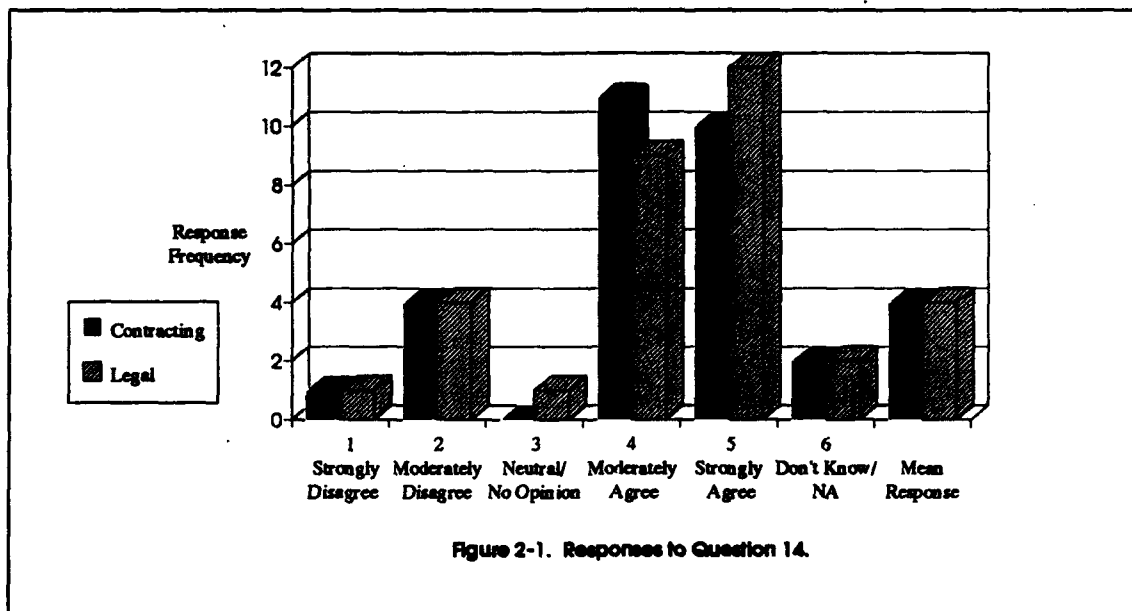
Summary of Investigative Question 1. *In general, the data of the preceding questions indicate that most managers in the sample population understand the concepts of ADR, and support the employment of ADR. Survey data do not indicate that most managers have attended ADR training, have had actual experience using ADR, or offer assistance to their subordinates who are considering ADR use (Questions 2, 3, 6). The data do indicate that, at the present time, managers support sending subordinates to ADR training, but are not as enthusiastic about supporting "in-house" training. In general, it appears that managers support feedback regarding ADR use and publicly praise successful ADR implementation, though the data indicate these areas could be improved. The open-ended question also revealed that wider dissemination of ADR "lessons learned" would benefit both contracting and legal professionals (Questions 10, 11).*

Finally, the data indicate a general belief that ADR use will expand over the next two years (Question 12). The above factors reveal that management is supporting the use of ADR, and also reveal areas which need to be improved upon.

Investigative Question 2

The following questions were designed to help the researchers determine the extent to which users of ADR believe sufficient guidance and legal counsel is available to assist them in an ADR case.

Question 14: "A sufficient number of "experts" are available for me to contact for ADR advice."

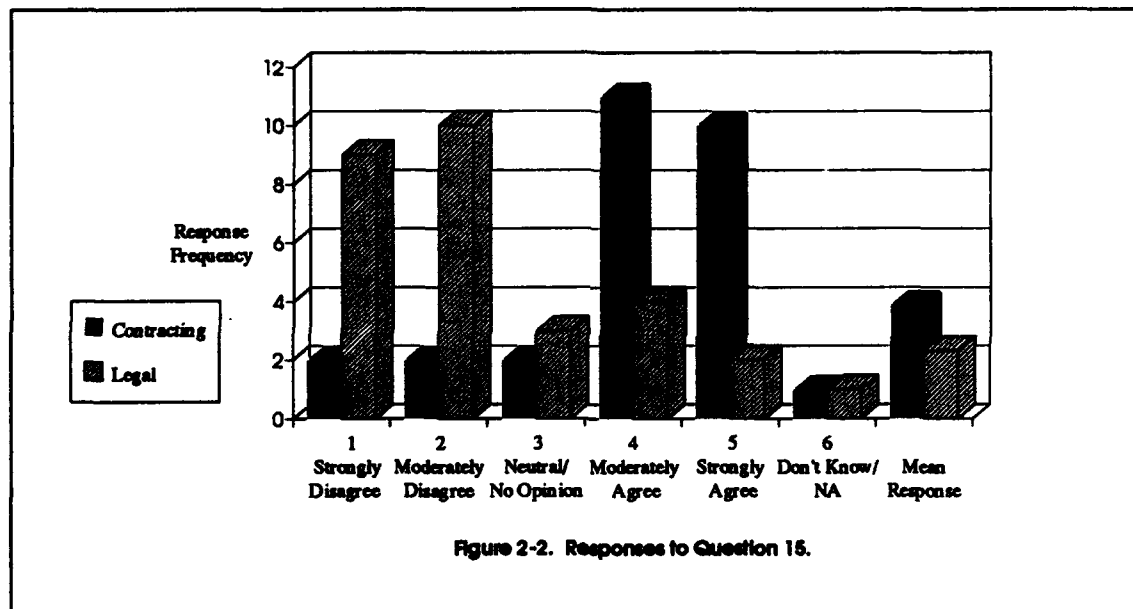


Contracting. Mean: 4.0. Standard deviation: 1.18. The data indicate that 75% of the contracting professionals surveyed agreed that a sufficient number of ADR "experts" are available for their consultation.

Legal. Mean: 4.0. Standard deviation: 1.21. The data indicate that 72% of the legal professionals surveyed agreed that a sufficient number of ADR "experts" are available for their consultation.

The purpose of this question was to determine if ADR users believe there is a sufficient number of experts available for consultation and guidance regarding a decision to employ ADR.

Question 15: "I am likely to seek ADR advice from contracting experts."



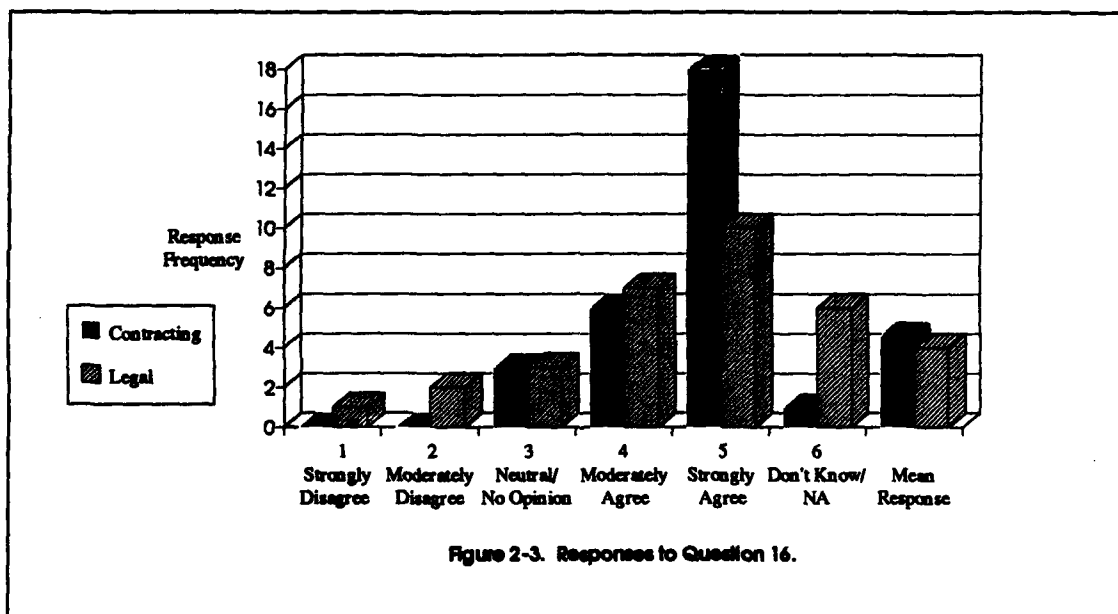
Contracting. Mean: 3.9. Standard deviation: 1.21. The data indicate that 75% of the contracting professionals surveyed agreed that they are likely to seek ADR advice from other contracting experts.

Legal. Mean 2.3. Standard deviation: 1.27. The data indicate that only 21% of the legal professionals are likely to seek ADR advice from contracting experts, while 66% are not likely to do so.

The literature reviewed concerning ADR revealed that animosity may exist between the CO and the attorney, and can adversely impact an applicable COs decision,

such as whether or not to employ ADR. The purpose of this question is to assess the degree of cooperation between contracting and legal communities regarding the decision to employ ADR. These responses indicate a significant tendency for attorneys to choose not to seek contracting professional's advice with regard to employing ADR. This data does not reveal if this choice is influenced by animosity, absence of a requirement, or other reasons.

Question 16: "I am likely to seek ADR advice from legal counsel."



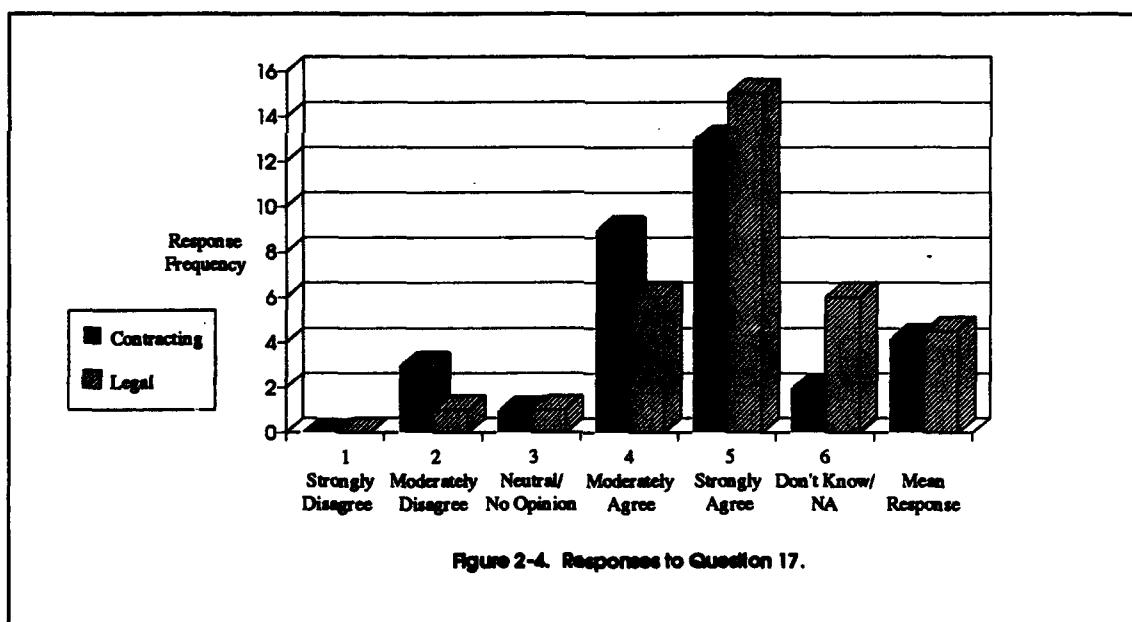
Contracting. Mean: 4.6. Standard deviation: .70. The data reveal that 86% of the surveyed contracting professionals would seek ADR advice from the legal community, while 0% disagreed. The responses suggest that contracting people believe it is necessary (and a FAR requirement) to consult legal counsel before making a dispute decision.

Legal. Mean: 4.0. Standard deviation: 1.17. The data indicate that 55% of the surveyed legal professionals are likely to seek ADR advice from other legal counsel members. However, because over 20% of the respondents answered "Don't Know/Not Applicable," and 24% disagreed or answered "neutral," the researchers can not reasonably

conclude that attorneys generally seek other attorneys advice with regard to ADR employment.

This question complements Question 15, and was designed to further assess the cooperation between contracting and legal communities regarding the decision to employ ADR. The data indicate the majority of both professions seek legal advice. While the majority of the legal professionals do not seek contracting professional's advice, the researchers can not conclude that this tendency is influenced by an adversarial tense relationship.

Question 17: "Legal counsel has sufficient expertise to assist me in employing ADR."

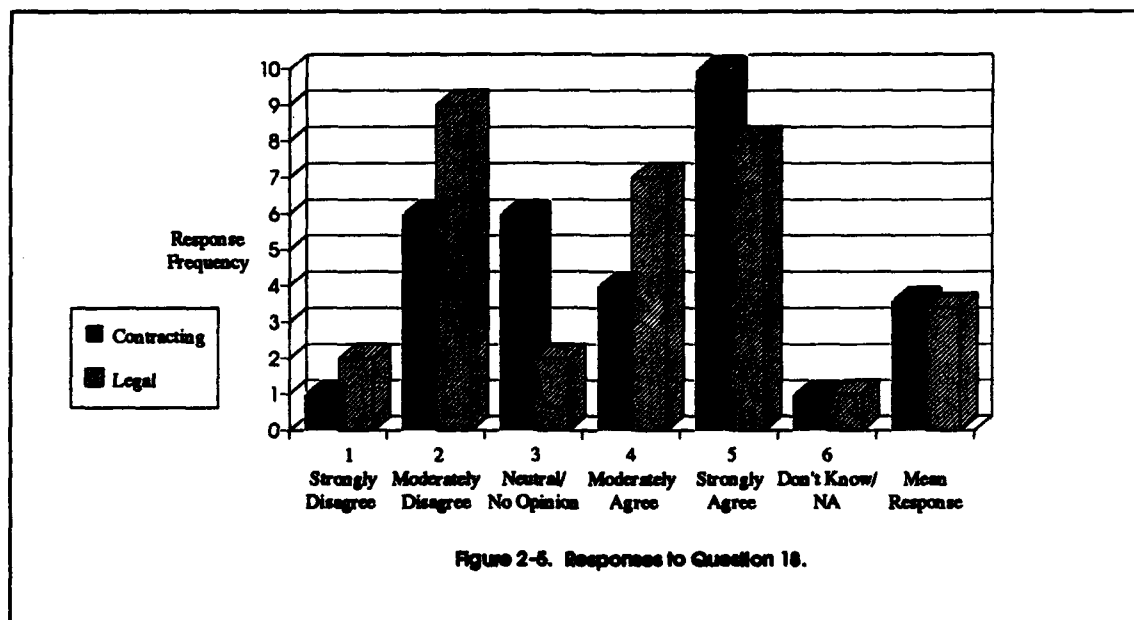


Contracting. Mean: 4.2. Standard deviation: .99. The data indicate that 75% of the surveyed contracting professionals agreed that legal counsel is equipped with sufficient ADR expertise to assist them in employing ADR. Only 10.7% disagree.

Legal. Mean: 4.5. Standard deviation: .79. The data indicate that 66% of the surveyed legal professionals agree that they are sufficiently equipped with ADR expertise to assist each other in employing ADR. Only 3.4% disagree.

The literature review established the contracting and legal professionals as the essential decision makers in the ADR process, and stated the FAR requirement for contracting officers to seek legal counsel before making a dispute related decision. This question was designed to capture ADR users' level of confidence in their legal counsel. The responses indicate a high level of confidence regarding ADR legal advice.

Question 18: "An agency ADR point-of-contact {also know as the Alternative Dispute Resolution Specialist (ADRS)}, would be beneficial as a means of obtaining ADR guidance."

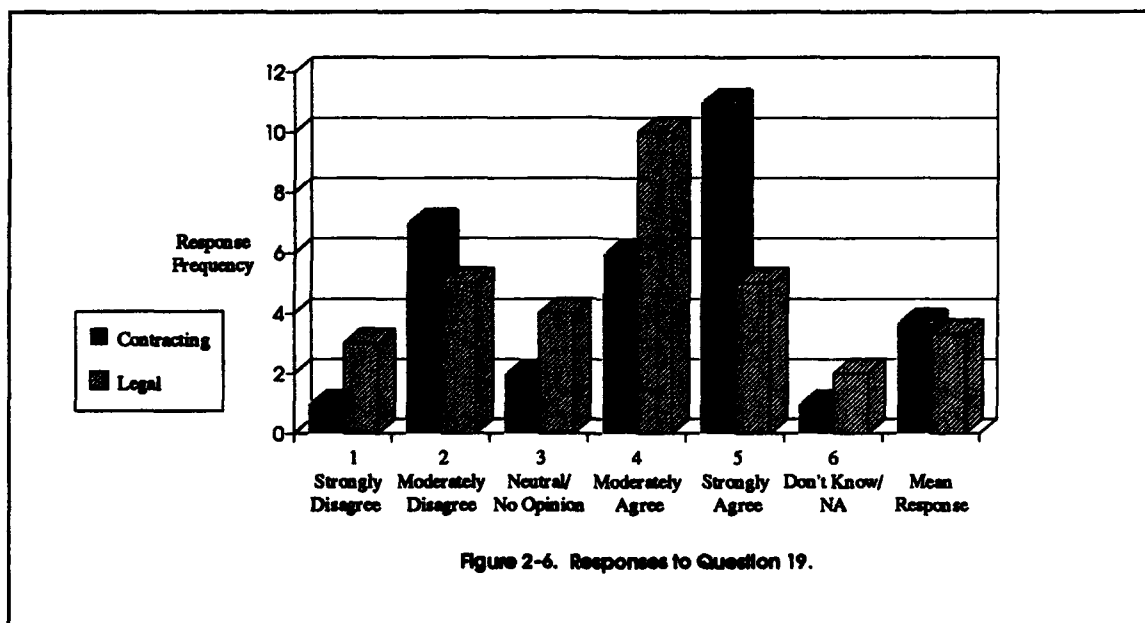


Contracting. Mean: 3.6. Standard deviation: 1.31. The data indicate that 50% of the surveyed contracting population agreed that an ADRS would be beneficial, while 39% disagreed, and 11% were either neutral or uncertain..

Legal. Mean: 3.4. Standard deviation: 1.39. The data indicate that 52% of the surveyed legal population agreed that an ADRS would be beneficial, while 38% disagreed, and 10% were neutral or uncertain.

The literature review indicated a potential need for an ADRS to be made available for consultation regarding ADR. The wide disparity of responses to this question do not strongly advocate the need for an ADRS as an ADR consultant.

Question 19: "I would seek guidance from an ADRS for assistance in possible ADR cases."

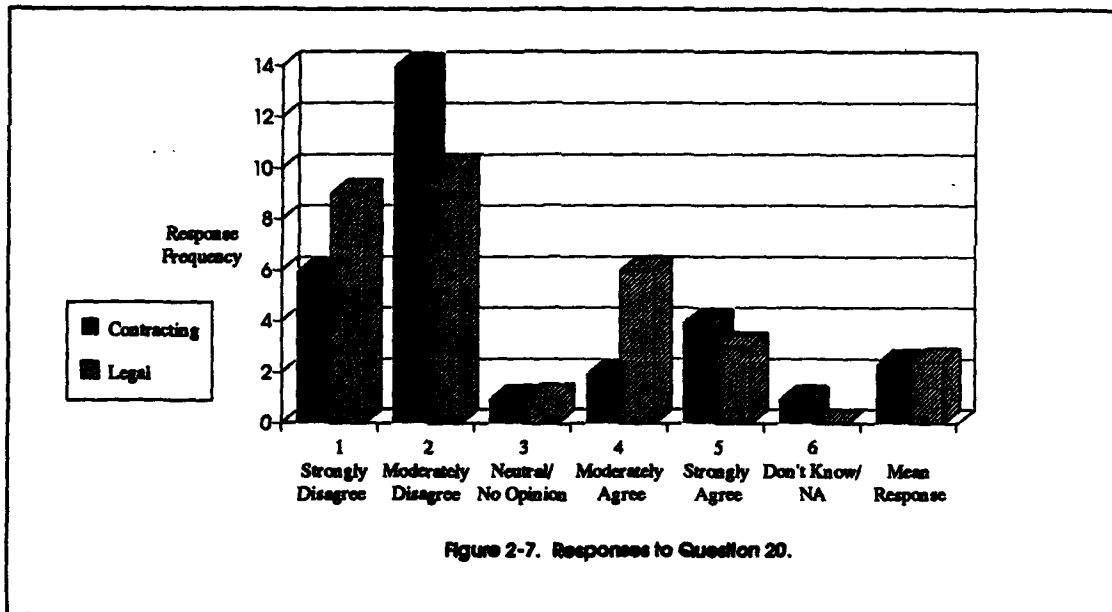


Contracting. Mean: 3.7. Standard deviation: 1.39. The data indicate that 61% of the surveyed contracting community agreed that they would consult with the ADRS in ADR cases, while 29% disagreed.

Legal. Mean: 3.3. Standard deviation: 1.3. The data indicate that 52% of the surveyed legal community agreed that they would consult with the ADRS in ADR cases, while 28% disagreed.

The wide disparity of responses, as with the previous question, do not strongly advocate the need for an ADRS for the purpose of consultation regarding the decision to employ ADR.

Question 20: "I would not try ADR without formal ADR training."

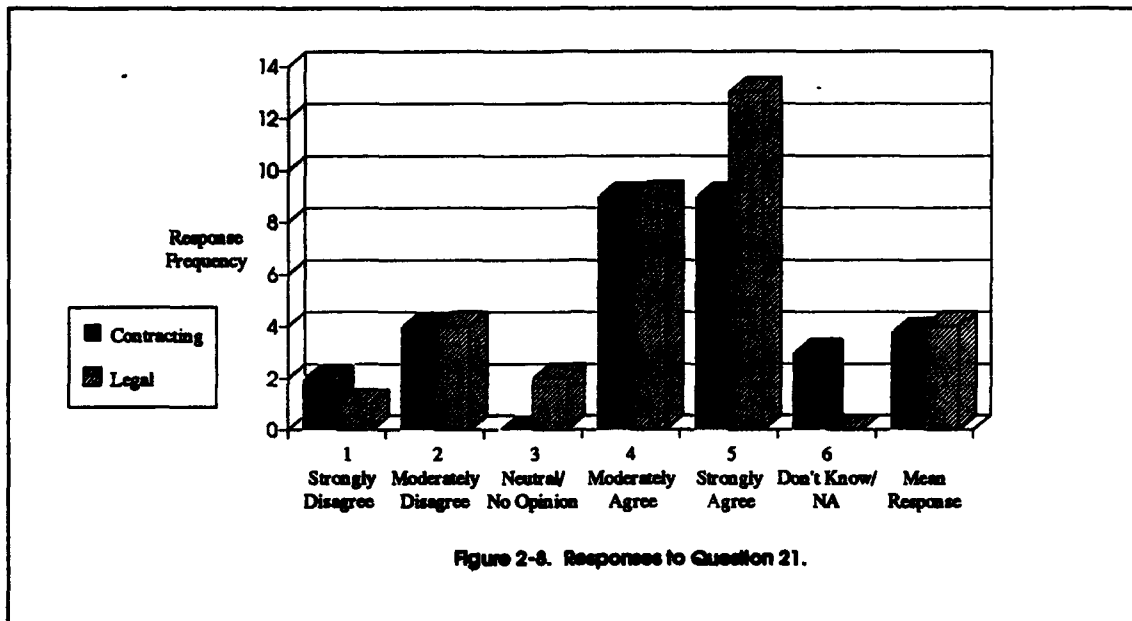


Contracting. Mean: 2.4. Standard deviation: 1.34. The data reveal that 71% of the surveyed contracting professionals would employ ADR without formal ADR training, while 21% would require such training before employing ADR.

Legal. Mean: 2.4. Standard deviation: 1.4. The data reveal that 66% of the surveyed legal community would employ ADR without formal ADR training, while 31% indicate they would require training before employing ADR.

The purpose of this question was to assess, at the current level of available guidance and training, if formal training is required before the general sample population would employ ADR. The data indicate that the majority of the sample population would proceed with ADR without formal training, yet the significant disparity of opinion suggest that a substantial portion of the population would prefer to be trained beforehand.

Question 21: "I am adequately trained to employ ADR."

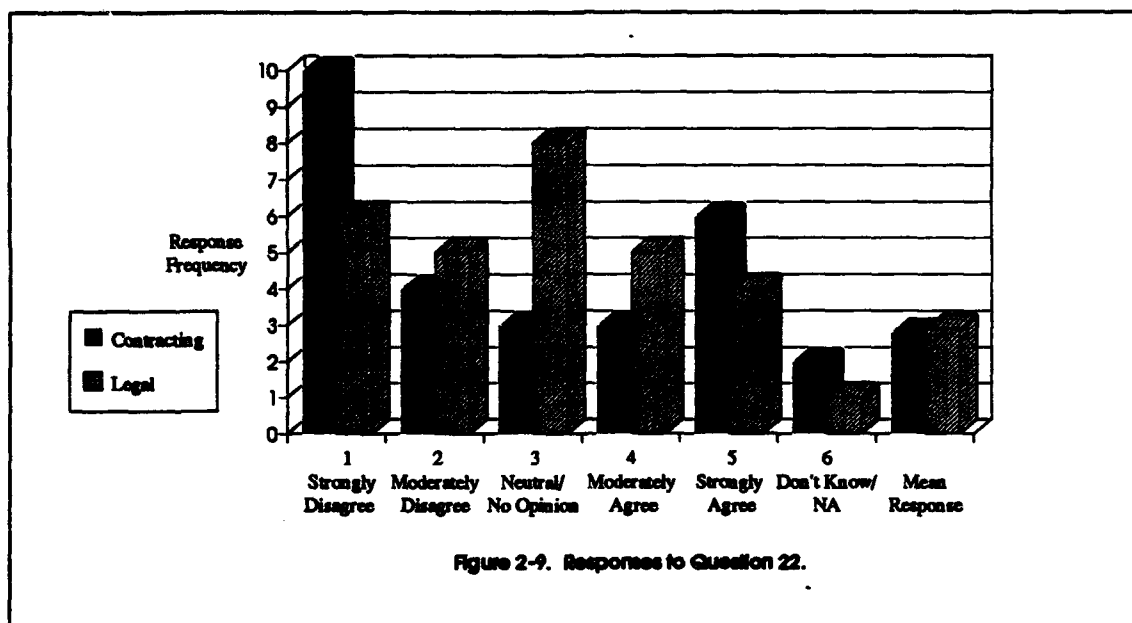


Contracting. Mean: 3.8. Standard deviation: 1.32. The data indicate that 64% of the surveyed contracting professionals believe they are adequately trained to employ ADR, while 29% do not.

Legal. Mean: 4.0. Standard deviation: 1.2. The data indicate that 76% of the surveyed legal professionals believe they are adequately trained to employ ADR, while 17% do not.

This question was designed to assess, at the current level of available guidance and legal counsel, if ADR users believe they are adequately trained. As with the previous question, it appears that most of the population believes it is not in urgent need of additional training. However, the disparity in responses indicates a significant portion of the population requires additional training before they would feel confident using ADR.

Question 22: "I have tried ADR as a direct result of knowledge gained from training."

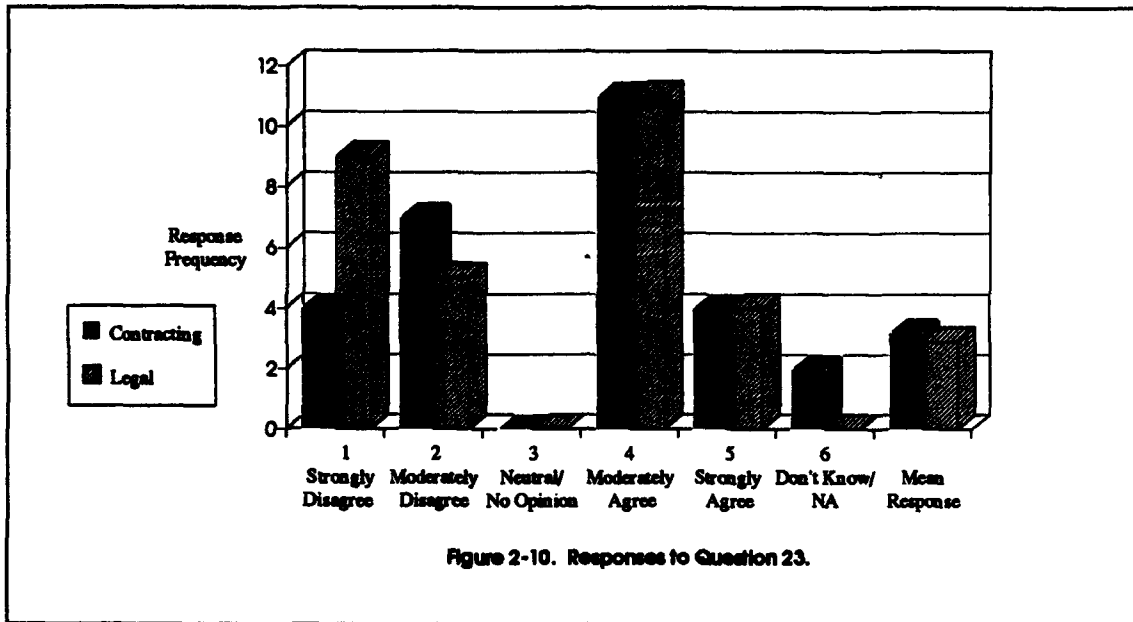


Contracting. Mean: 2.8. Standard deviation: 1.65. The data reveal that 50% of the respondents had not employed ADR as a direct result of training, while 32% agreed that they had.

Legal. Mean: 2.9. Standard deviation: 1.35. The data indicate that 38% of the legal respondents had not employed ADR as a direct result of training, while 32% agreed that they had.

The purpose of this question was to assess the level of benefits from ADR training. The wide disparity in responses indicate only that training benefited slightly over one-third of the population, and did not conclusively benefit the others. In retrospect, it appears the researchers could improve this question's design by first screening its respondents to those who had been to training and had also employed ADR.

Question 23: "I don't feel formal training is required to successfully use ADR."

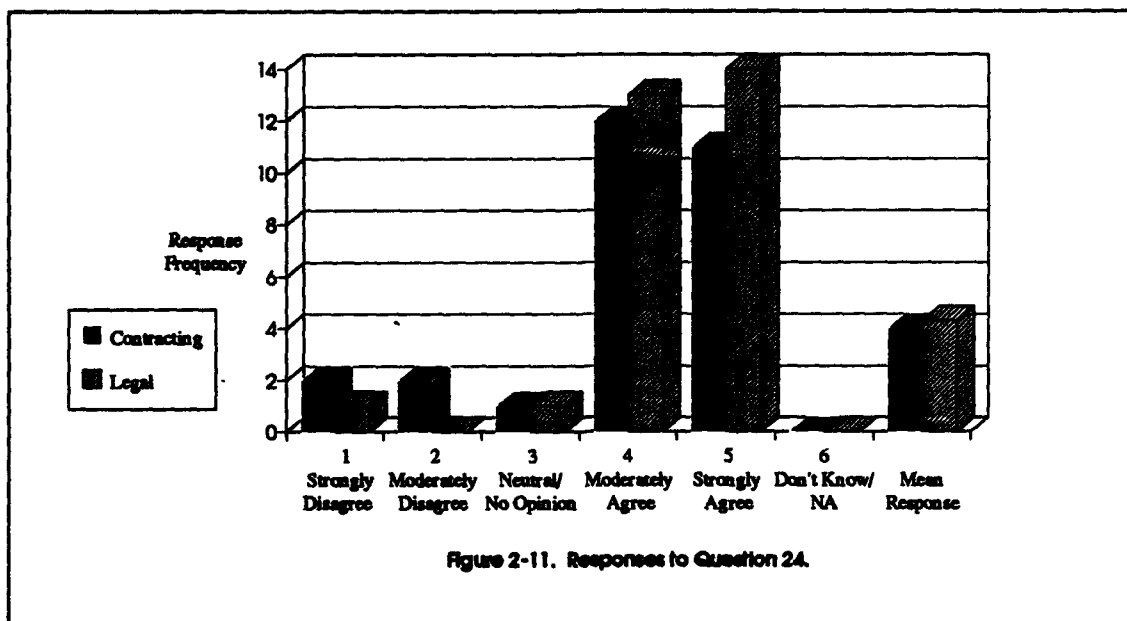


Contracting. Mean: 3.2. Standard deviation: The data indicate that 54% of the contracting respondents agreed that formal training is *not* required to successfully employ ADR, while 39% indicate that formal training *is* required.

Legal. Mean: 2.9. Std. Standard deviation.: 1.55. The data indicate that 52% of the legal respondents agreed that formal training is *not* required to successfully employ ADR, while 48% indicate that formal training *is* required.

Due to the wide response disparity, the data do not conclusively indicate that ADR can be successfully employed without formal training. Very few of the surveyed ADR users "strongly agreed" with this question, and in both professions, nearly half of the respondents disagreed.

Question 24: "My office is familiar with ADR procedures."

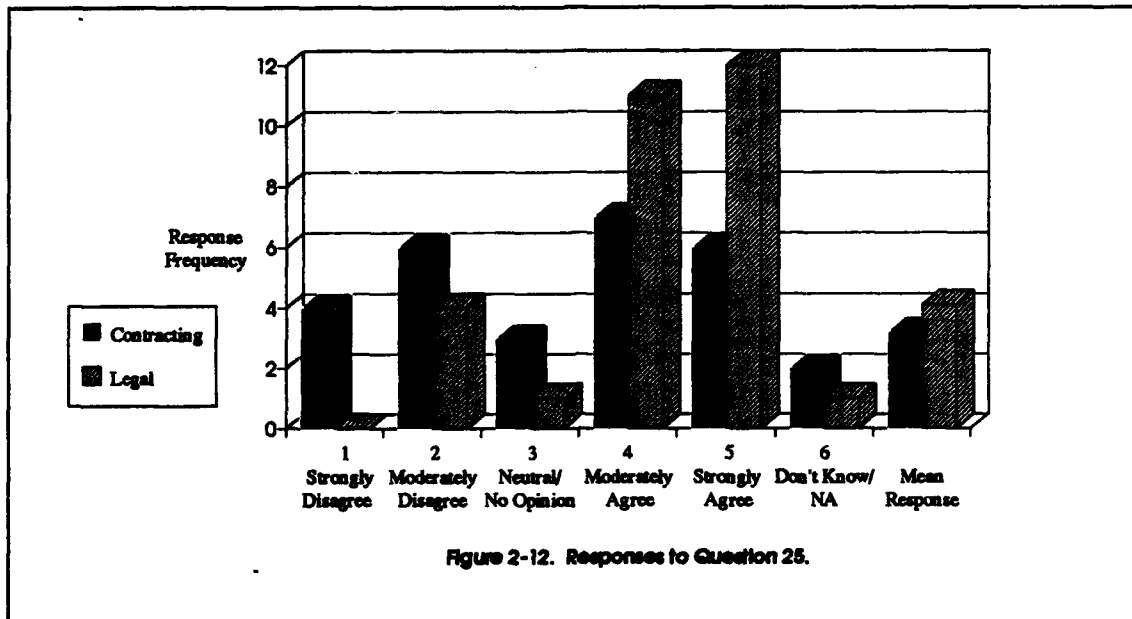


Contracting. Mean: 4.0. Standard deviation: 1.18. The data reveal that 82% of the contracting respondents agreed that their office is familiar with ADR procedures, while only 14% disagree.

Legal. Mean: 4.3. Standard deviation.: .86. The data indicate that 93% of the legal respondents agree that their office is familiar with ADR procedures.

The purpose of this question was to assess, at the current level of guidance and available legal counsel, if office personnel are fairly familiar with how to employ ADR in appropriate situations. The responses suggest that generally, personnel in the sample population work in an office that is familiar with ADR employment procedures.

Question 25: "There is sufficient written guidance available which explains ADR procedures."

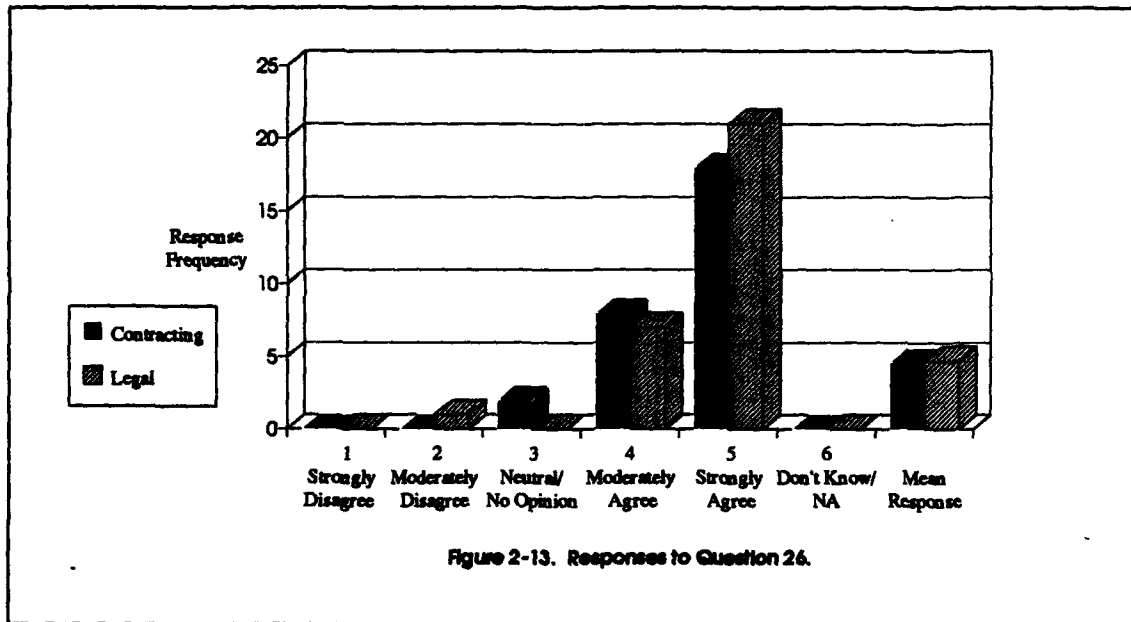


Contracting. Mean: 3.2. Standard deviation: 1.44. The data indicate that 46% of the contracting respondents agreed that there is a sufficient level of written guidance explaining ADR procedures, while 28% indicated that more sufficient guidance is needed.

Legal. Mean: 4.1. Standard deviation: 1.03. The data indicate that 79% of the legal respondents agreed that a sufficient level of written ADR guidance is currently available, while only 14% disagree.

This question is directly related to this section's investigative question. The contracting data, with its less than majority agreement and a fairly wide response dispersion, suggests that the contracting community believes more written guidance would be beneficial. In general, the legal community appears to be content with the current level of written guidance.

Question 26: "At my current level of experience and/or training, I believe I could effectively employ ADR techniques to resolve contract disputes."

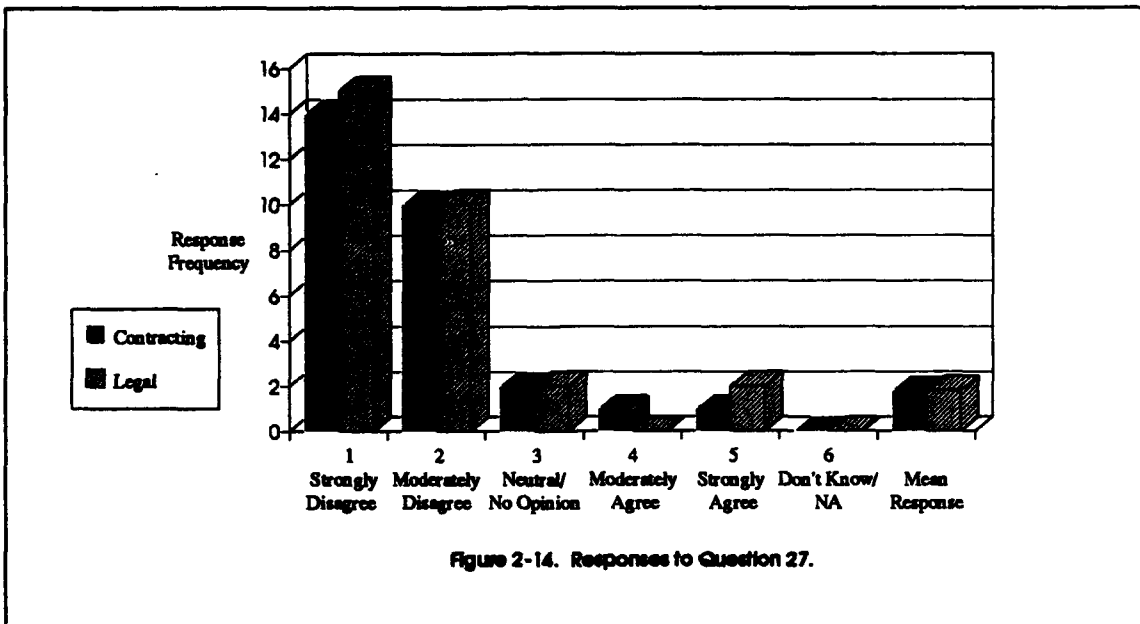


Contracting. Mean: 4.6. Standard deviation: .63. The data indicate that 93% of the contracting respondents believed they could effectively employ ADR techniques to resolve contract disputes at their current level of training. Note that 0% disagree.

Legal. Mean: 4.7. Standard deviation: .67. The data indicate that 97% of the legal respondents agreed that they could effectively employ ADR techniques to resolve contract disputes at their current level of training, while only 3.4% disagree.

This question was designed to complement the previous questions, to offer insight regarding the sample population's confidence level for employing ADR, given the current level of training, guidance, and legal counsel. The data suggest an overwhelming confidence of the sampled population to employ ADR at their current level of training.

Question 27: "I would avoid trying ADR because of a lack of formal implementation training."



Contracting. Mean: 1.8. Standard deviation: 1.00. The data indicate that 86% of the contracting respondents would *not* avoid trying ADR due to a lack of formal implementation procedures. Just over 7% indicate that they *would* avoid trying ADR for this reason.

Legal. Mean: 1.8. Standard deviation: 1.09. The data indicate that 86% of the legal respondents disagree that they would avoid trying ADR due to a lack of formal implementation procedures. Only 7% indicated they *would* avoid trying ADR for this reason.

In general, these responses suggest that the current level of training for ADR within the Army and Army Corps of Engineers has adequately equipped ADR users in the contracting and legal communities.

Question 28: " Please share your feelings regarding whether the current level of ADR training, guidance, legal counsel encourages or discourages you from employing ADR; and, in which areas do you have recommendation for improvement?"

Several respondents (twelve) commented that the current level of available ADR training is sufficient. Others added that they had employed ADR successfully without specific training, and that not everyone may need training because ADR is a "team approach." One comment stated that training would be *helpful*, but is not *necessary*, and another indicated that the training they received was "top quality."

Twelve other respondents indicated a need for additional training and guidance. Seven comments requested more training. These comments suggest that increased training would increase ADR use, and that training should be mandatory and should be conducted by persons with actual ADR experience. Managers should be trained first, and then the subordinates should be *encouraged* to attend training. Three specific comments indicated a need for more formal ADR implementation procedures, a need to learn the different types of ADR, and a lack of understanding for which type to use in certain situations. Two contracting respondents commented that more training is necessary in order to decrease contracting professionals' reliance on the legal community.

Three comments encouraged "team building" between government professionals. "Partnering" (as in Question 13) was encouraged to reduce the number of claims, and "practice runs" of mini-trials and negotiations were recommended to allow the government settlement teams to get a "feel" for how the actual ADR session will proceed. Two comments encouraged more publicity of ADR benefits and actual "lessons learned."

Two responses related to contracting, legal, and management issues, suggesting that dispute settlements ought to be conducted by contracting officers, with less emphasis on legal; however, two other responses indicated that legal support was "a must."

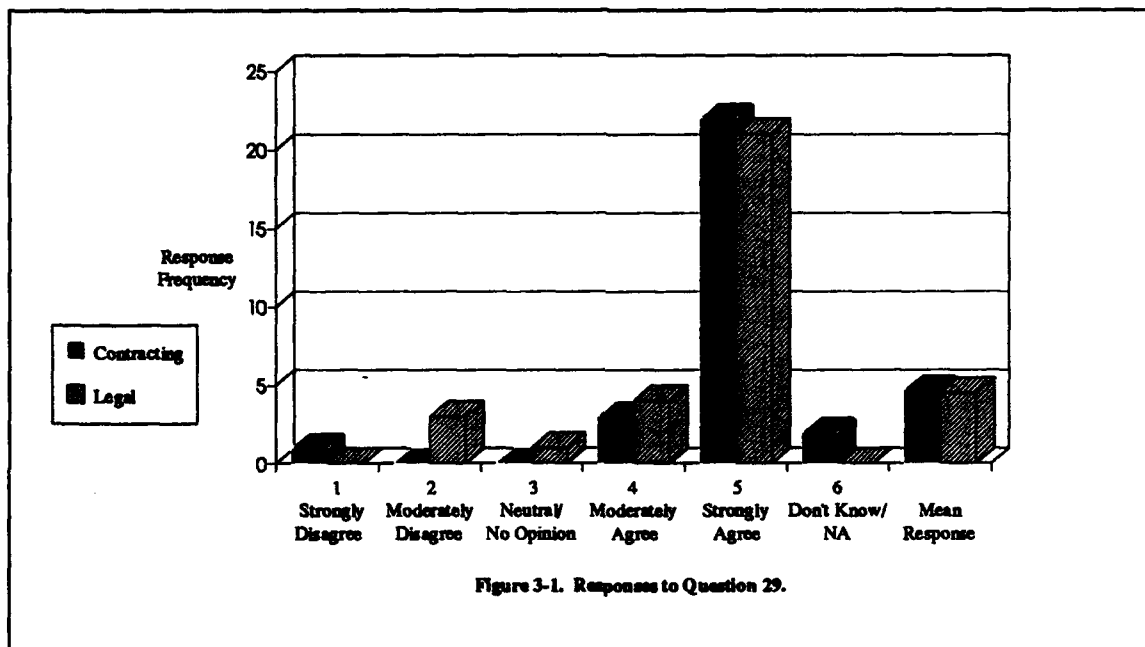
Another response indicated that management has been a "positive influence" in employing ADR thus far.

Summary Analysis of Investigative Question 2. *The data indicate that the sample population generally agrees that a sufficient level of guidance and legal counsel is available to help them assess their ADR decision.* The data did not indicate an overwhelming need for an ADRS for guidance purposes. In Questions 20, 24, 26 and 27, the responses indicate that potential ADR users would be comfortable employing ADR use at their current training levels, and that their office personnel are familiar with ADR procedures. However, Questions 21, 22, 23, and 28 reveal that a substantial number of people are not comfortable with their current level of training. The written comments suggest that "partnering," team building, and additional ADR publicity would be beneficial as additional training tools.

Investigative Question 3

This section presents analysis of the data obtained to assess the extent users of ADR believe ADR is an efficient and effective method of contract dispute resolution.

Question 29: "I believe that ADR is less time consuming than resolving disputes through litigation."



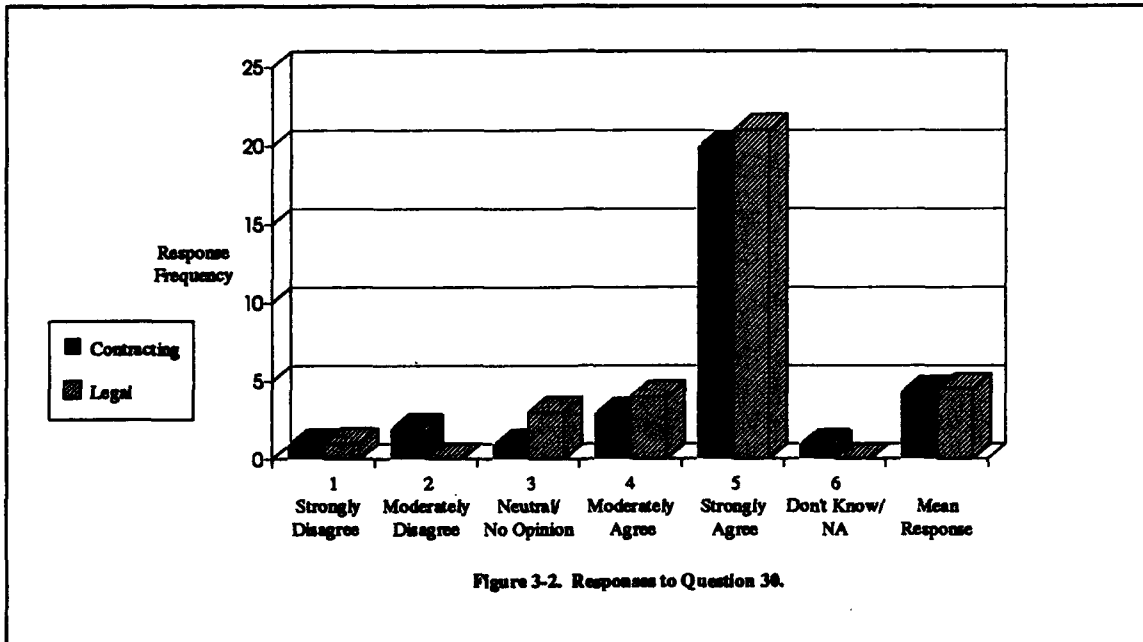
Contracting. Mean: 4.7. Standard deviation: .83. The data illustrate that 89% of the contracting respondents agreed that ADR is less time consuming than resolving disputes through litigation.

Legal. Mean: 4.5. Standard deviation: .99. 86% of the surveyed legal professionals agreed that resolving a dispute through ADR is less time consuming than through litigation.

The purpose of this question was to assess the degree to which the respondents believed that employing ADR to resolve contract disputes would generally take less time than resolving the disputes through the litigation process. The data suggest that as a

whole, the surveyed ADR users agreed that using ADR generally takes less time than litigation to resolve disputes.

Question 30: "I feel that ADR is less costly than resolving disputes through litigation."

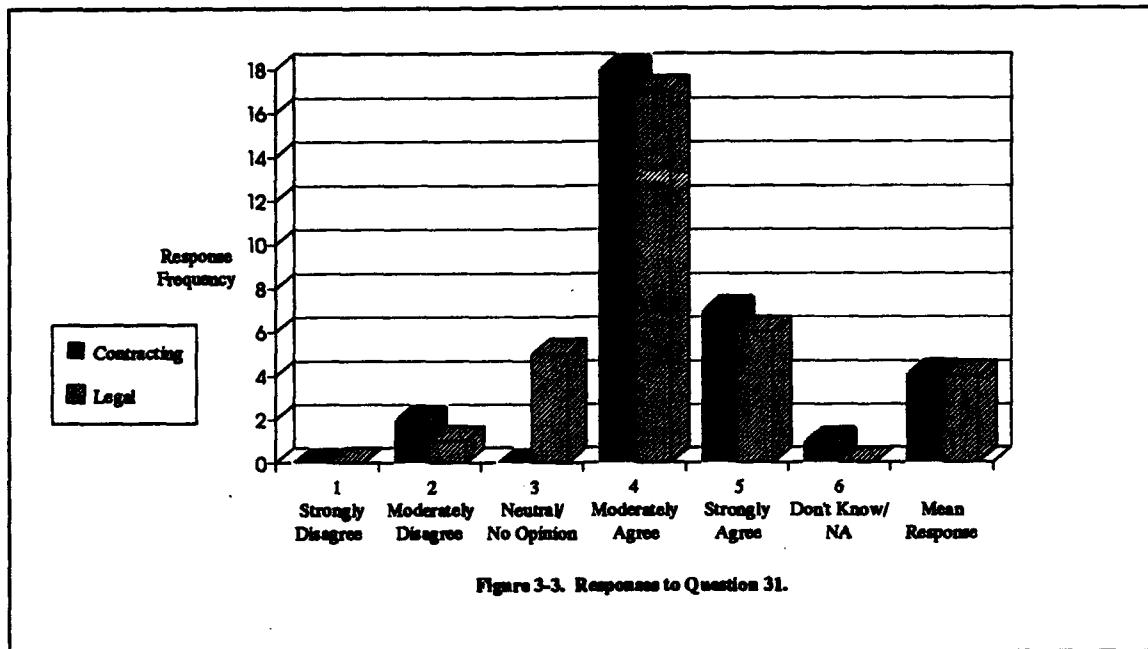


Contracting. Mean: 4.4. Standard deviation: 1.12. 82% of the surveyed contracting professionals felt that ADR is less costly than resolving disputes through litigation.

Legal. Mean: 4.5. Standard deviation: .95. The data reveal that 86% of the legal respondents agreed that ADR is generally less costly than resolving disputes through litigation.

In addition to reportedly saving time, another benefit of ADR, found during the review of literature, is that it is less costly than settling cases through the litigation process. The data suggest a strong belief that ADR is less costly than resolving disputes through litigation.

Question 31: "Contractors will agree to employing ADR to settle contract disputes."

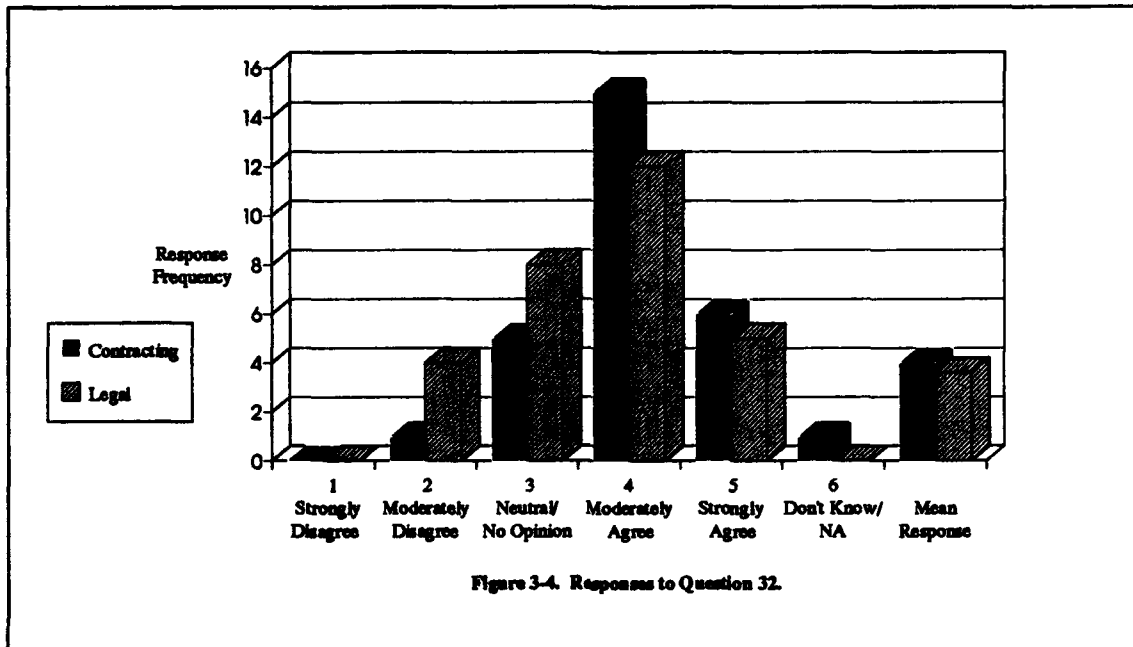


Contracting. Mean: 4.1. Standard deviation: .75. Of the contracting professionals surveyed, 89% agreed that contractors will likely agree to employ ADR to settle contract disputes.

Legal. Mean: 4.0. Standard deviation: .73. 79% of the legal respondents believed that contractors will support using ADR to settle any contract disputes.

The purpose of this question was to assess the degree to which contracting and legal professionals thought that contractors would be willing to try ADR to settle contract disputes. The data suggest that surveyed contracting and legal professionals agree that contractors will generally be willing to try ADR as a means to resolve disputes.

Question 32: "Contractors will recommend employing ADR to settle contract disputes."

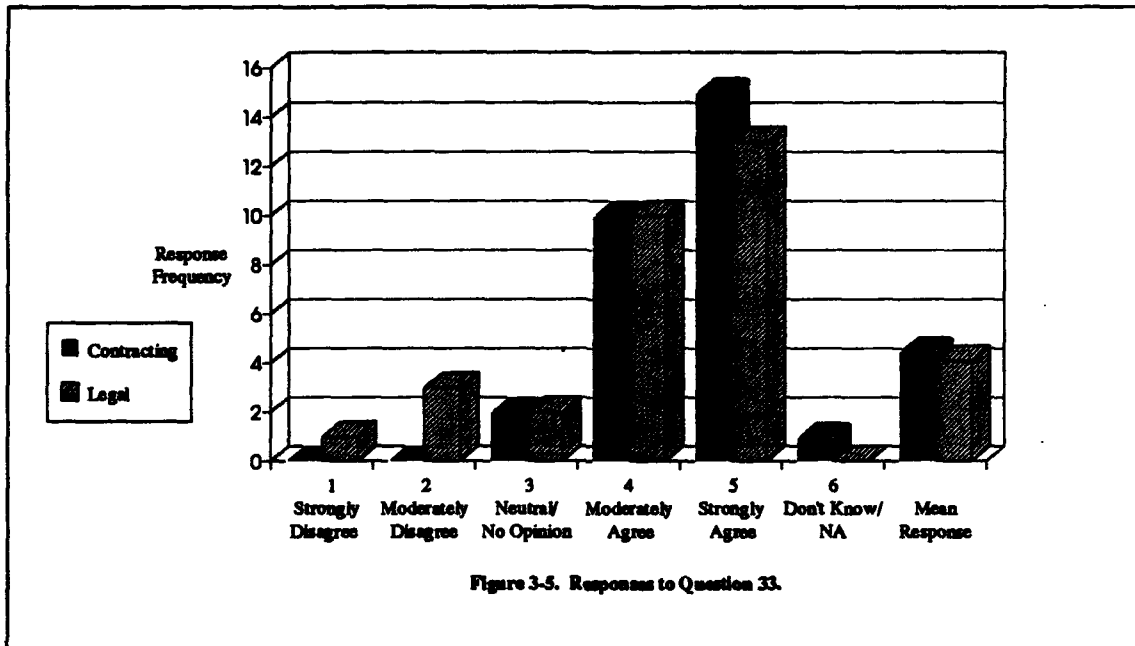


Contracting. Mean: 4.0. Standard deviation: .76. 75% of the contracting respondents agreed that the contractors with whom disputes exist would likely recommend using ADR as means of settling contract disputes.

Legal. Mean: 3.6. Standard deviation: .94. Of the surveyed legal professionals, 59% felt that contractors would recommend using ADR to the settle disputes.

The purpose of this question was to obtain the respondents' perspectives of the degree to which contractors were aware of and supported ADR. The data indicate that, in general, surveyed contracting and legal professionals agreed that contractors would likely recommend using ADR to settle contract disputes.

Question 33: "I feel ADR will facilitate better Government/contractor relationships than resolving disputes through litigation."

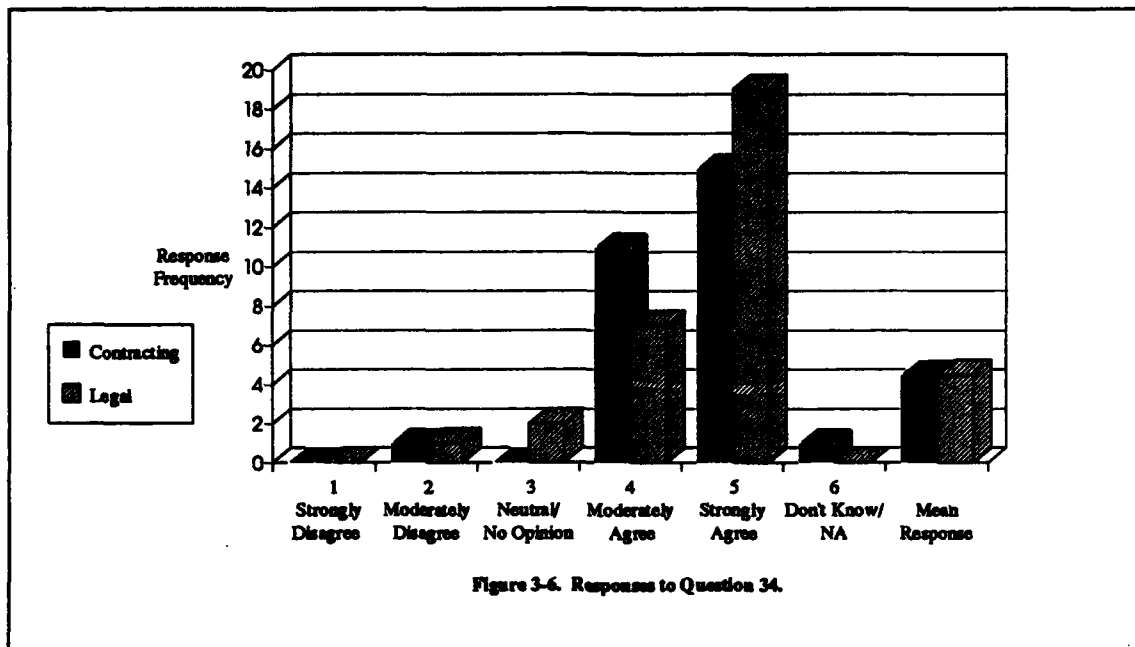


Contracting. Mean: 4.5. Standard deviation: .64. 89% of the contracting respondents agreed that ADR will facilitate better Government/contractor relationships than by settling disputes through litigation.

Legal. Mean. 4.1. Standard deviation: 1.13. Of the surveyed legal professionals, 79% felt that using ADR instead of litigation as a means of resolving disputes would enhance better relationships between the Government and the disputing contractor.

A widely purported attribute of ADR is that its use lessens the resentment harbored during litigation. The purpose of this question was to assess the degree to which contracting and legal professionals believed this to be true. The data suggest that most surveyed professionals believe that using ADR would facilitate better Government/contractor relationships than resolving disputes through litigation.

Question 34: "Settling a contract dispute using ADR results in compromise by both parties."

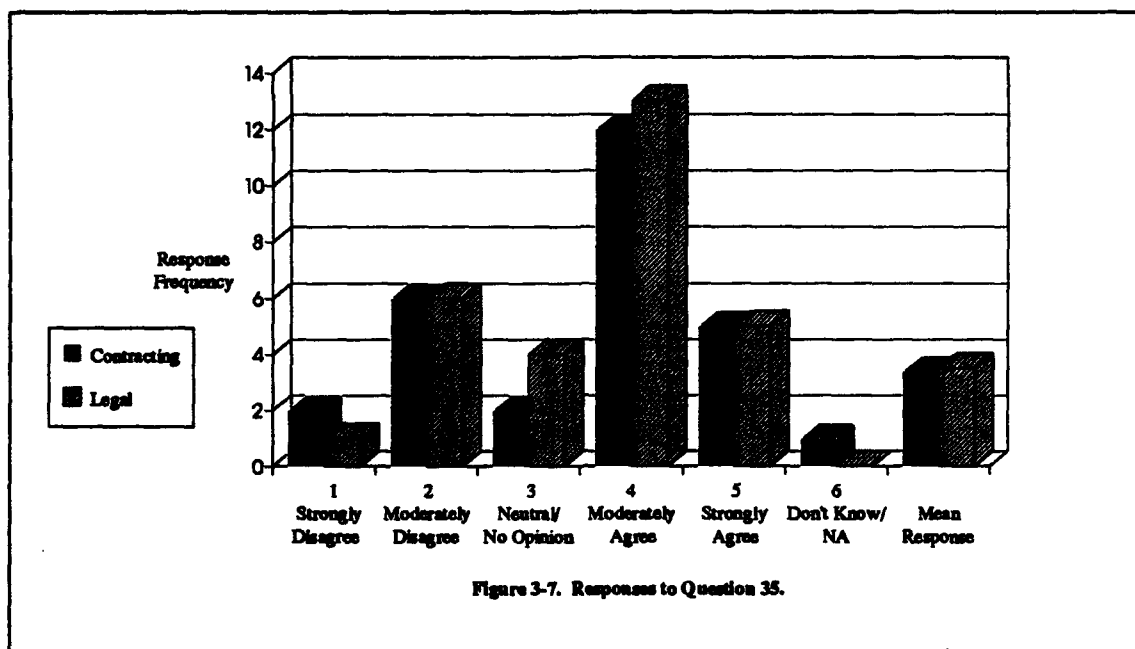


Contracting. Mean: 4.5. Standard deviation: .70. An overwhelming 93% of the contracting respondents agreed that using ADR to resolve contract disputes results in compromise by both parties.

Legal. Mean: 4.5. Standard deviation: .78. The data reveal that 90% of the legal respondents felt that settling a dispute using ADR results in compromise by both parties.

The purpose of this question was to assess the degree to which contracting and legal professionals believe that successful dispute resolution requires, to some extent, both parties to compromise their positions. The data suggest that nearly all of those surveyed believe that some compromise by both parties is required for contract dispute settlement through ADR.

Question 35: "If a dispute is not settled using ADR and proceeds to litigation, the respective parties' cases have been exposed."

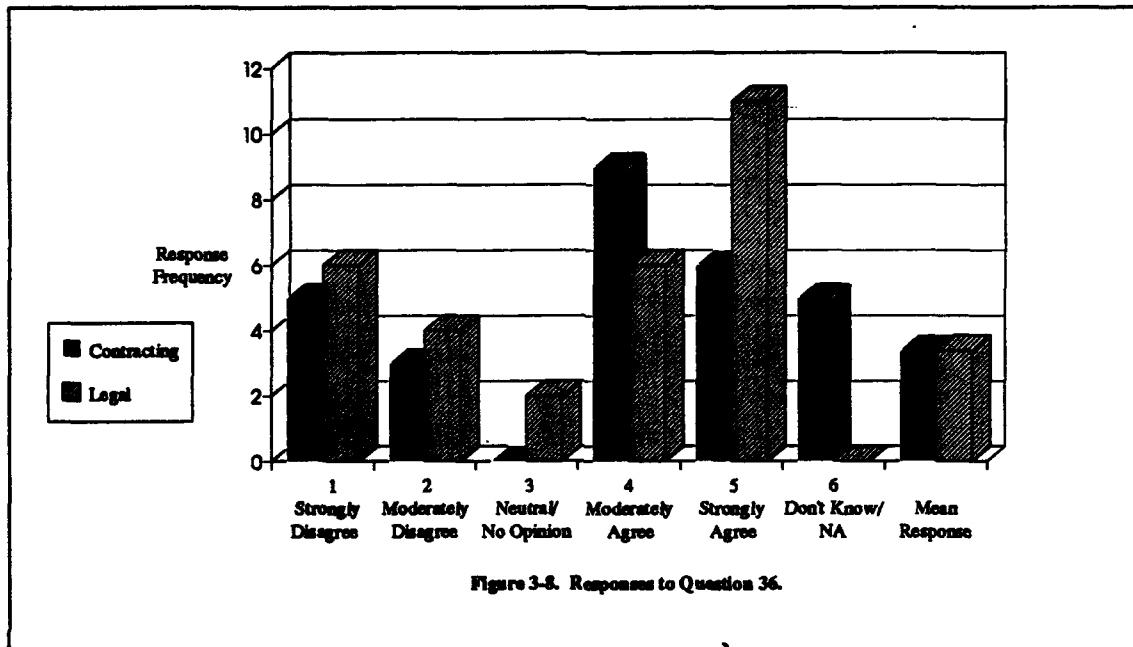


Contracting. Mean: 3.4. Standard deviation: 1.25. The data reveal that 61% of the surveyed contracting professionals agreed that ADR exposes the respective parties' cases.

Legal. Mean: 3.5. Standard deviation: 1.12. Similar to the contracting responses, 62% of the legal respondents felt that if a dispute was not settled using ADR and proceeded to litigation, the respective parties' cases would be exposed.

One reported negative perception of ADR is that it reveals the other side's position, which could adversely affect each parties' position should the dispute go to litigation. The purpose of this question was to assess the degree to which contracting and legal professionals believed this to be true. The data suggest that slightly more than half of the respondents do believe that attempting to settle a dispute using ADR will reveal each parties' position.

Question 36: "ADR settlement agreements are equally as binding/enforceable as a judge's decision rendered through litigation."

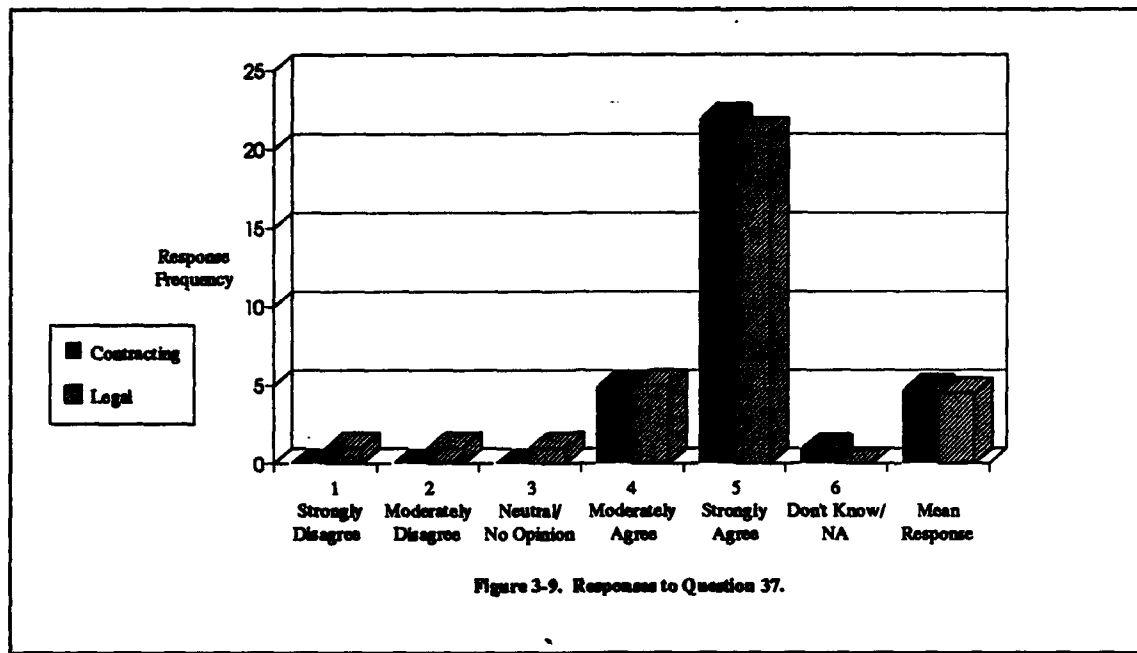


Contracting. Mean: 3.4. Standard deviation: 1.56. Of the contracting responses, 54% agreed that ADR settlement agreements are as equally binding as court decisions; 18% answered that they did not know. A standard deviation of 1.56 indicates a wide disparity of opinions.

Legal. Mean: 3.4. Standard deviation: 1.62. A total of 59% of the surveyed legal professionals believed that agreements reached through ADR were as enforceable as those rendered by court decisions. Interestingly, 34% disagreed with this statement, thereby causing a relatively large variance in opinion.

The review of literature indicated that some don't believe ADR is as legally enforceable as a decision rendered through litigation. This data indicate that slightly more than half (with a wide disparity) of the surveyed professionals believe that, in fact, ADR settlement agreements are as equally enforceable as court ordered decisions.

Question 37: "All things considered, I feel that ADR (used in appropriate situations) can be a better means to resolve contract disputes than litigation."

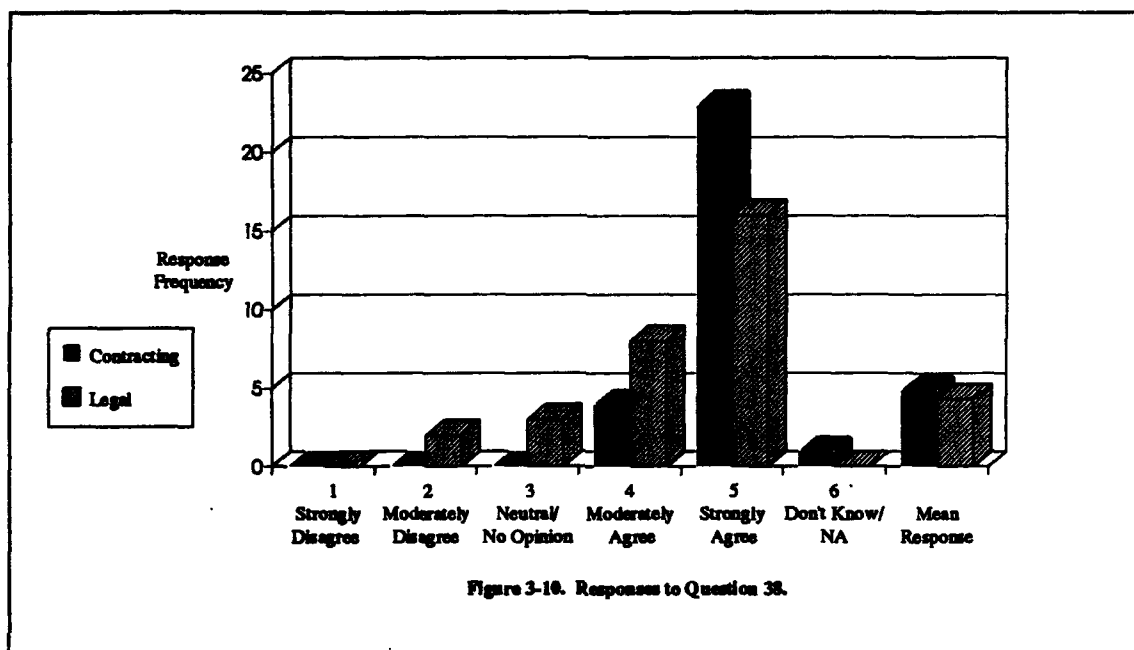


Contracting. Mean: 4.8. Standard deviation: .40. An overwhelming 96% of the surveyed contracting professionals felt that ADR, used in appropriate situations, can be a better means to resolve contract disputes than litigation.

Legal. Mean: 4.5. Standard deviation: .99. Of those surveyed legal professionals, 90% agreed that ADR can be a better means of resolving contracting disputes than litigation.

The purpose of this question was to assess the general perception of the relative benefit of using ADR instead of litigation. The data indicate an overwhelming belief that ADR can, if used in appropriate situations, be a better mean of resolving contract disputes than through the traditional means of litigation.

Question 38: I would rather try to settle a dispute by employing ADR than by immediately proceeding with litigation."

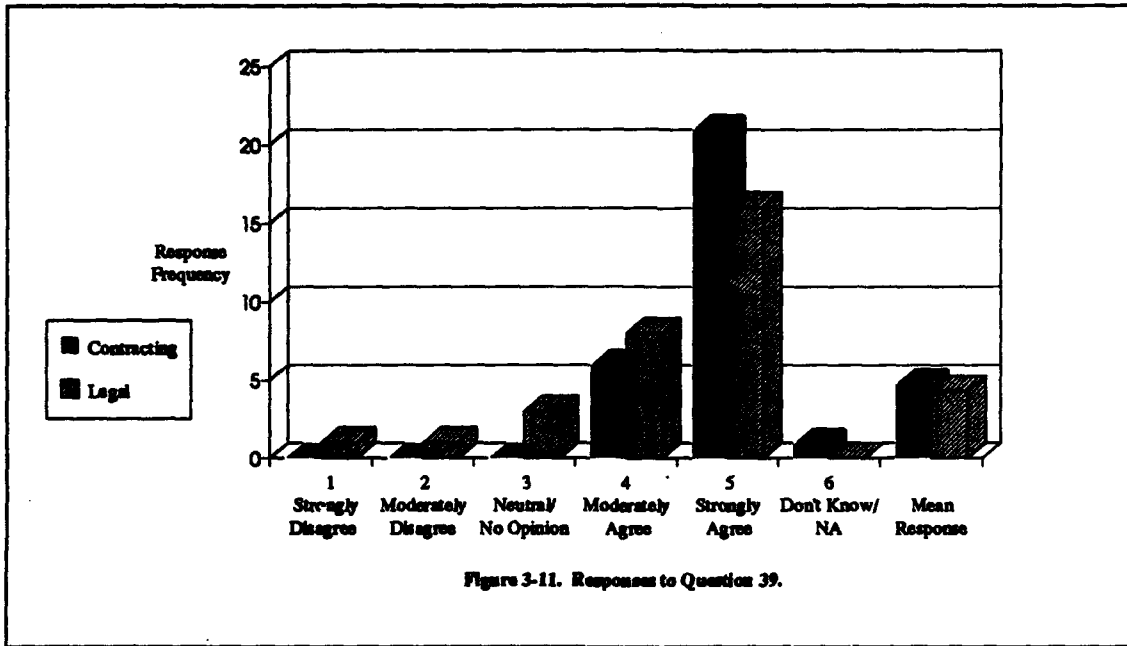


Contracting. Mean: 4.9. Standard deviation: .36. The data reveal that 96% of those contracting respondents agreed that they would rather try to settle disputes using ADR than by immediately proceeding with litigation.

Legal. Mean: 4.3. Standard deviation: .93. Slightly more than 83% of the surveyed legal professionals said that they would try ADR to settle contract disputes before beginning litigation proceedings.

The purpose of this question was to assess the degree to which contracting and legal professionals would actually attempt to employ ADR. The data indicate a strong willingness to employ ADR instead of merely processing the dispute through general litigation procedures.

Question 39: "Given my training and/or experience with ADR, I would likely recommend its use to others."

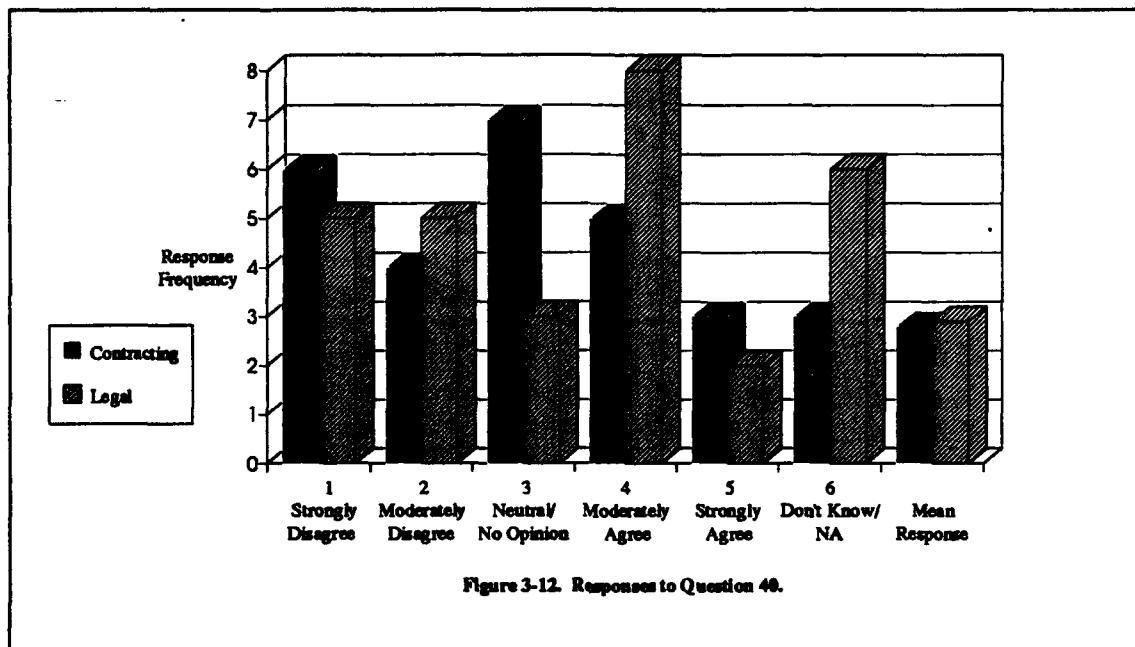


Contracting. Mean: 4.8. Standard deviation: .42. Of the surveyed contracting professionals, 96% agreed that they would likely recommend ADR usage to others.

Legal. Mean: 4.3. Standard deviation: 1.03. The data reveal that 83% of the surveyed legal professionals said that they would likely recommend others to employ ADR.

The purpose of this question was to assess the degree to which the surveyed individuals would advocate and recommend ADR as a means to settle contract disputes. The data indicate overwhelming advocacy of ADR usage by the surveyed professionals.

Question 40: "My program manager influences my decision to employ ADR."



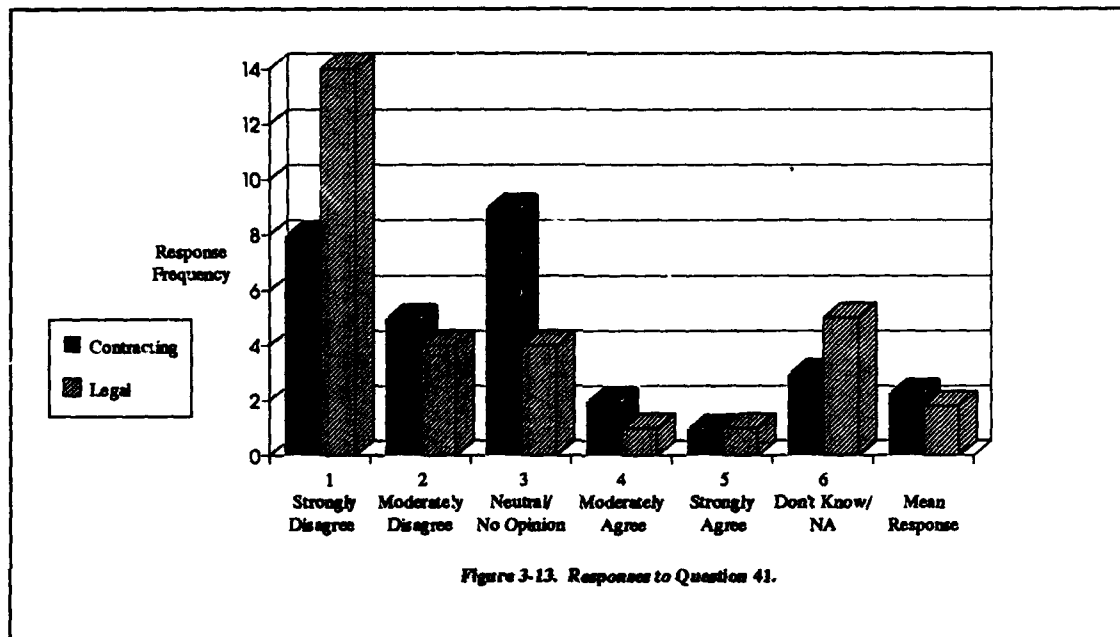
Contracting. Mean: 2.8. Standard deviation: 1.35. A mean value close to the "neutral" response and a relatively large response dispersion indicate that no pronounced opinion exists.

Legal. Mean: 2.9. Standard deviation: 1.36. Similar to the responses by contracting professionals, the mean value near the "neutral" response and a large response variance indicate a wide variety of perceptions. 21% answered "not applicable."

The review of literature indicated that program managers may influence the employment of ADR by contracting personnel. The purpose of this questions was to assess the degree to which this influence is perceived to exist. The data reflect that no solid conclusions may be drawn as to the beliefs that program managers may influence the decision to employ ADR. The very large response dispersion may be attributable to the

fact that many respondents, especially legal professionals, do not directly work with program managers, and therefore would not be influenced by them.

Question 41: DCAA auditors influence my decision to employ ADR."

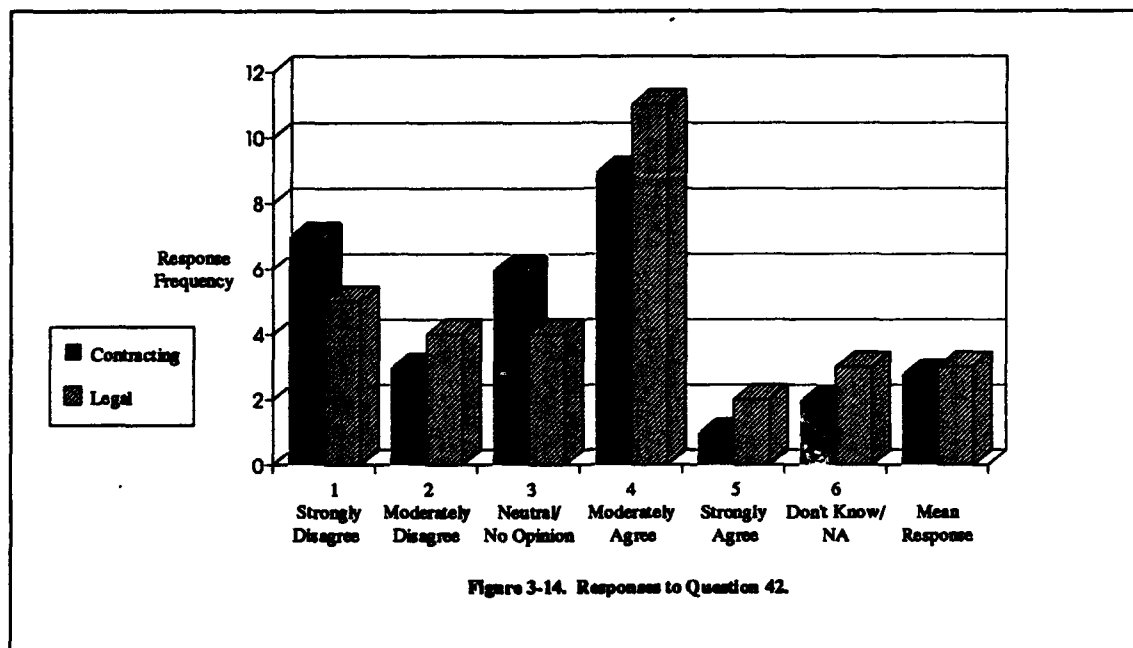


Contracting. Mean: 2.3. Standard deviation: 1.14. Of the surveyed contracting professionals, 46% disagreed and only 11% agreed that DCAA auditors influence their decision to employ ADR.

Legal. Mean: 1.8. Standard deviation: 1.14. The data reveal that 62% of those legal respondents disagreed that DCAA auditors impact their decision to employ ADR.

The review of literature indicated that DCAA auditors can greatly influence the use of ADR. This data indicate that in general, DCAA auditors do not greatly influence the employment of ADR among contracting and legal professionals.

Question 42: "Engineers/technical representatives influence my decision to employ ADR."

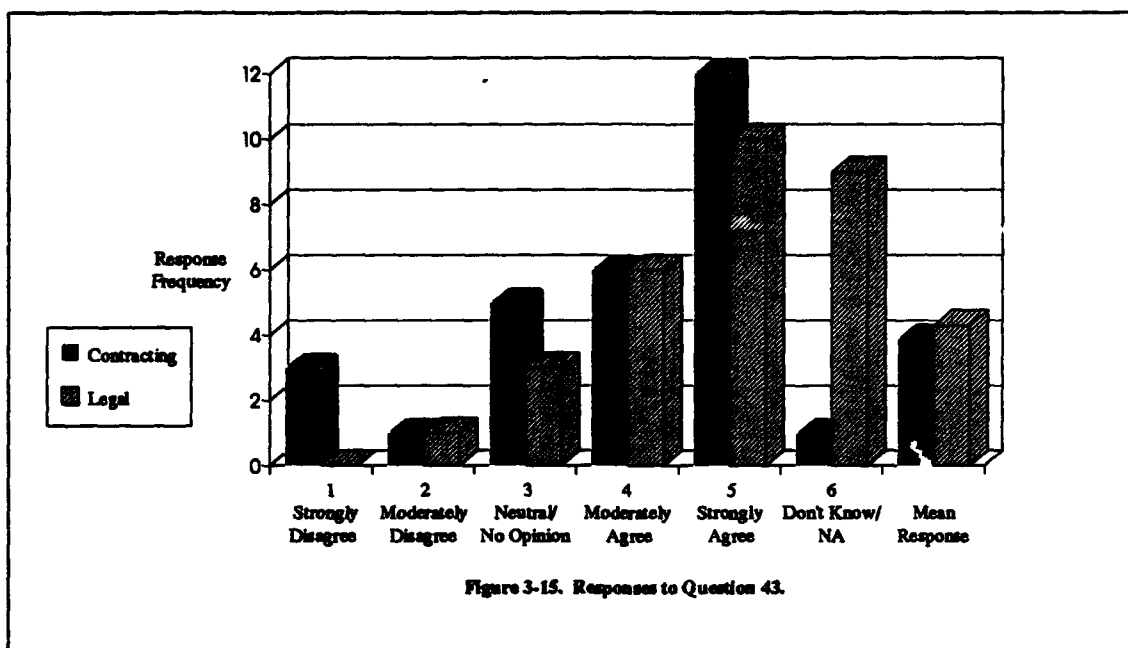


Contracting. Mean: 2.8. Standard deviation: 1.31. Of those contracting respondents, 36% agreed and 36% disagreed that technical representatives influenced their decision to employ ADR.

Legal. Mean 3.0. Standard deviation: 1.31. The data reveal that 45% of the surveyed legal professionals agreed and 31% disagreed that their employment of ADR was influenced by technical representatives.

The literature review revealed that engineers and other technical representatives may influence the decisions to employ ADR. The purpose of this question was to assess the degree to which this may be true. The data suggest that a wide disparity exists among respondents as to the degree of influence technical representatives have on their decisions to employ ADR.

Question 43: "Legal counsel influences my decision to employ ADR."



Contracting. Mean: 3.9. Standard deviation: 1.35. Among those contracting respondents, 64% agreed that legal counsel influences their decisions to employ ADR. Note the wide disparity of opinions.

Legal. Mean: 4.3. Standard deviation: .91. Most (55%) agreed, however, many (39%) answered "N/A" because they themselves are legal counsel.

The review of literature suggested that legal counsel may influence contracting professionals' decisions to employ ADR in appropriate situations. The purpose of this question was to assess the degree to which this is actually perceived. The data suggest that legal counsel does, to some extent, influence contracting professionals' decisions of employing ADR.

Question 44: "Settling disputes with ADR allows the government and the contractors to reach a more beneficial settlement than through litigation. Do you agree or disagree, and why?"

The researchers included this question in the survey in order to assess the extent to which the contracting and legal respondents believed settling disputes using ADR allows each disputing party a more beneficial settlement than possible through litigation. This open-ended question encouraged the respondents to narrate their feelings and perceptions with regard to the question.

Of the respondents who answered the question, 84% agreed and 16% disagreed that ADR allows for a more beneficial settlement than litigation. The following is a description of the most frequently cited reasons to why the respondents agreed or disagreed.

Most respondents who agreed said the reasons are that ADR is less costly, takes less time, and is more flexible than settling contract disputes through the litigation process. Other notable reasons given by respondents were that using ADR better facilitates maintaining positive government/contractor relationships, and that settlements via ADR generally provide for better outcomes because the disputing parties know the details of the situations better than do judges.

Of those minority respondents who disagreed, most noted that when using ADR, the government often compromises its position when it shouldn't. The cited reasons for this compromise include pressures to settle and the goal to attain established ADR goals. The respondents did not elaborate on the specifics of the mentioned ADR goals. Another reason given by those who disagreed is that they felt ADR necessarily disclosed the respective parties positions.

Overall, analysis of this question indicates that respondents overwhelmingly agreed that ADR allows the government and the contractors to reach more beneficial settlements than through litigation.

Question 45: "Do you have any recommendations for preventing and/or resolving disputes?"

The purpose of this open-ended question was to provide a forum for the respondents to suggest methods they felt would prevent disputes from occurring, or other method for resolving disputes. The researchers feel that ADR may be a viable means of resolving disputes; however, they also advocate preventing potential disputes from ever occurring. For this reasons, the researchers felt it necessary to present these recommendations.

Of those respondents who answered the question, a large portion said that "partnering," would provide the best means for preventing disputes. "Partnering" is defined as the process of early planning, communication and teamwork building with the goal of preventing future disputes and adversarial tendencies between the government and contractors (Staser,1993:43). Other frequently cited recommendations for preventing and/or resolving disputes include: early legal guidance; pushing decision-making to the lowest levels; more training; and, writing/using better contract specifications.

Summary Analysis of Investigative Question 3. *In general, the data indicate a strong belief by those surveyed contracting and legal professionals that ADR is, in fact, an efficient and effective method of dispute settlement.* The respondents overwhelmingly agreed that employing ADR instead of going through litigation to resolve contract disputes saves time and money and generally results in "better" settlements. In this context, "better" settlements can be defined as those dispute agreements that are deemed more fair to the disputing parties than would be obtained through litigation.

The vast majority of respondents also agreed that the ADR settlements would facilitate better Government/contractor relationships than would result through litigation. This essentially means that long-term relationships could more easily remain positive by resolving disputes through ADR because the disputing parties are responsible for their own fate - they agree on the conditions of any ADR settlement. Many respondents

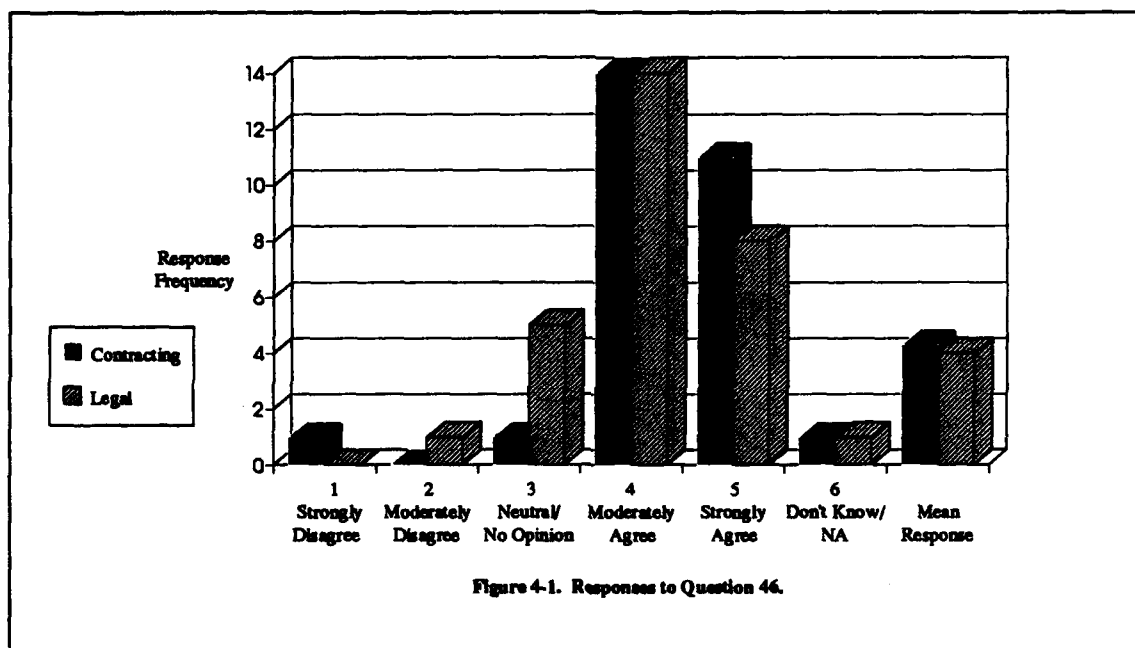
recommended using the partnering concept (concentration of initial and continuous Government-contractor communication) to prevent and/or resolve disputes.

With regard to personnel exerting influence on their decisions to employ ADR, the contracting and legal respondents generally did not feel that DCAA auditors or technical representatives had much of an impact. The data indicate however, that the contracting professionals were influenced by legal counsel regarding their decisions whether to employ ADR.

Investigative Question 4

This section presents analysis of the data obtained to determine if the users of ADR perceive any personal benefits or detriments by employing ADR to resolve contract disputes.

Question 46: "Employing ADR to settle a dispute would show personal initiative, even if a settlement was not reached."



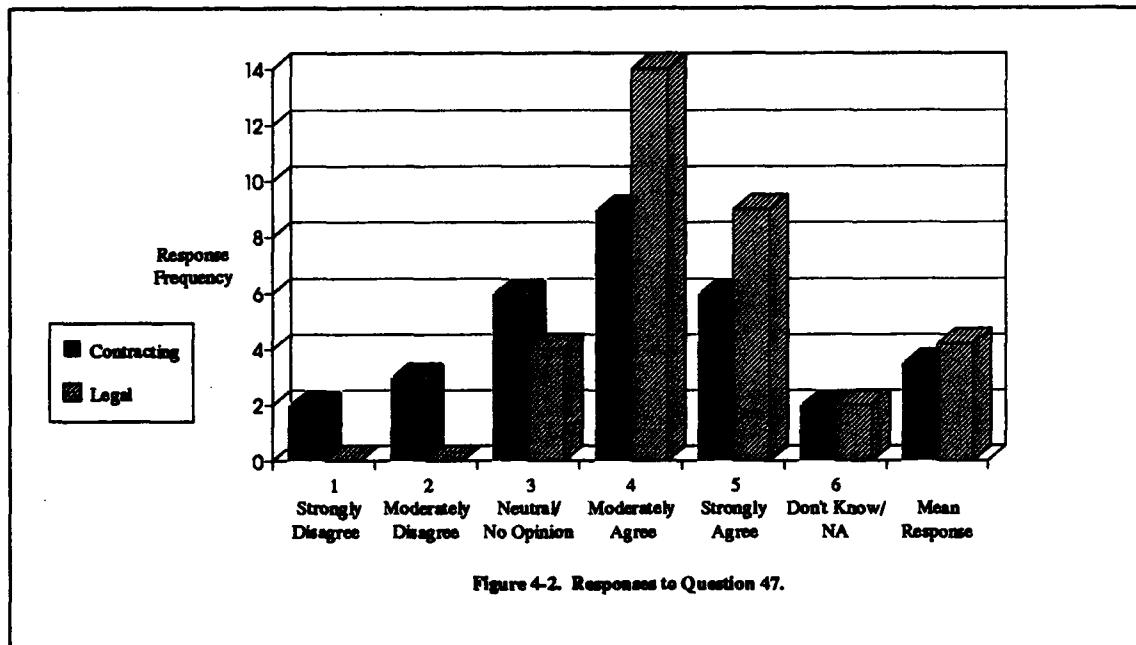
Contracting. Mean: 4.3. Standard deviation: .86. Of those responding contracting professionals, 89% agreed that employing ADR would show initiative, even if a settlement was not reached.

Legal. Mean: 4.0. Standard deviation: .70. The data reveal that 76% of the surveyed legal professionals believe that trying ADR would show personal initiative.

The purpose of this question was to assess the extent to which personnel feel they will receive some type of positive acknowledgment for employing ADR. The data suggest

that most surveyed contracting and legal professionals do feel that employing ADR would show personal initiative.

Question 47: "Employing ADR would reflect positively on my performance report."

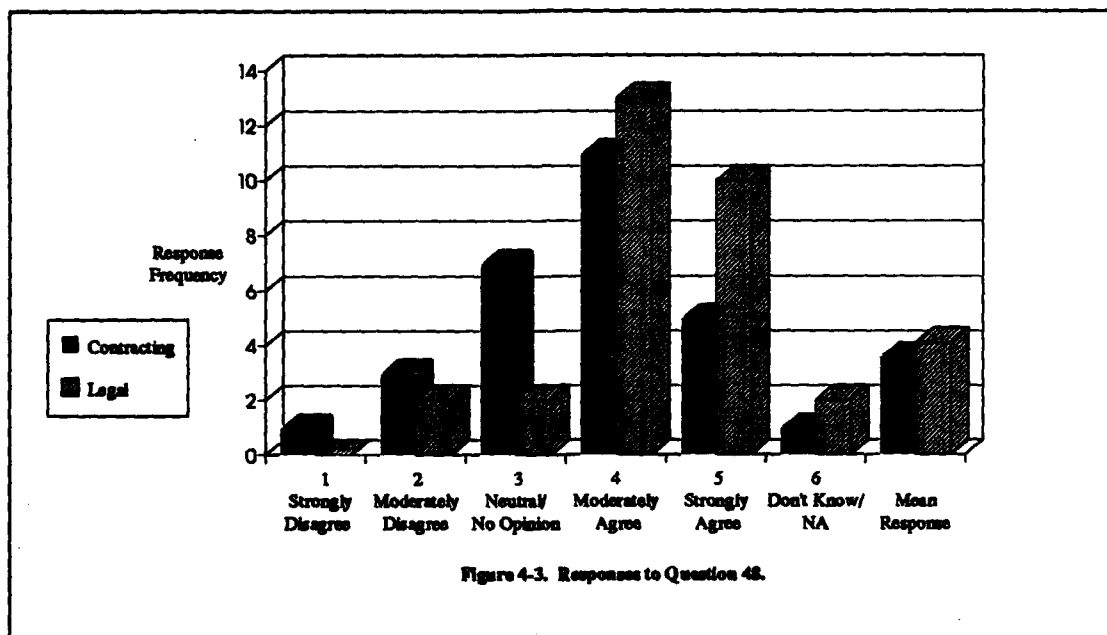


Contracting. Mean: 3.5. Standard deviation: 1.21. Slightly over one half (54%) of the contracting respondents agreed (with a wide response dispersion) that employing ADR would reflect positively on their performance report.

Legal. Mean: 4.2. Standard deviation: .68: A high percentage (79%) of the legal professionals believed that employing ADR would reflect positively on their performance report.

The purpose of this question was to assess the extent to which organizations have emphasized the use of ADR to the point of making appropriate employment actual evaluation criteria. The data suggest that legal professionals are more likely to get performance appraisal recognition for using ADR than are contracting professionals.

Question 48: "I would receive recognition for successfully employing ADR to resolve contract disputes."

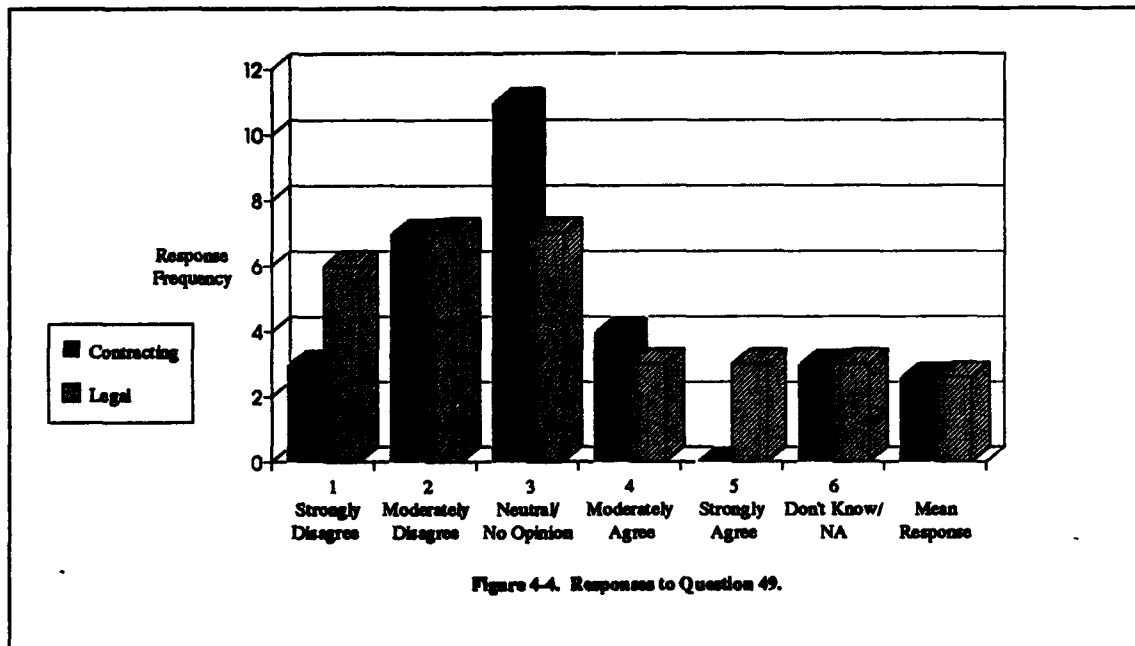


Contracting. Mean: 3.6. Standard deviation: 1.05. The data reveal that 57% of those surveyed contracting professionals thought that they would receive recognition for successfully employing ADR.

Legal. Mean: 4.1. Standard deviation: .86. Of those legal respondents, 79% agreed that they would receive some form of recognition for successfully employing ADR in resolving contract disputes.

The researchers included this question to assess to degree to which the respondents believe that they would receive recognition for successfully using ADR to settle contract disputes. The data suggest that ADR usage is more formally recognized in the legal than the contracting communities.

Question 49: "Resolving disputes using ADR will likely increase my chances for promotion."

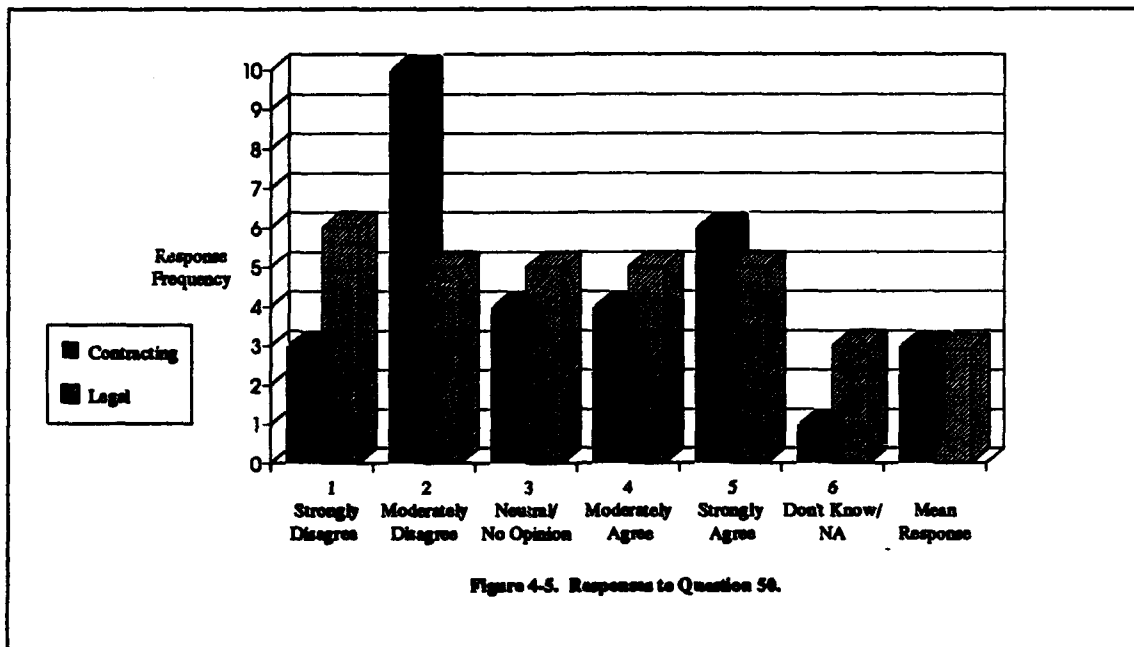


Contracting. Mean: 2.6. Standard deviation: .91. 36% of those contracting respondents disagreed that resolving disputes using ADR will increase their chances for promotion, while 39% answered "neutral."

Legal. Mean: 2.6. Standard deviation: 1.30. Of the surveyed legal professionals, 45% disagreed that their chances for promotion would increase by using ADR to effectively resolve contract disputes. The relatively large standard deviation of 1.30 reveals a wide disparity of responses.

Similar to Question 47, the purpose of this question was to assess the extent to which organizations have emphasized the use of ADR to the degree that ADR has become career-enhancing criteria. The data suggest that neither the contracting nor legal respondents believed that employment of ADR would likely increase their chances for promotion.

Question 50: "Before trying ADR, I would require encouragement and support from Management."

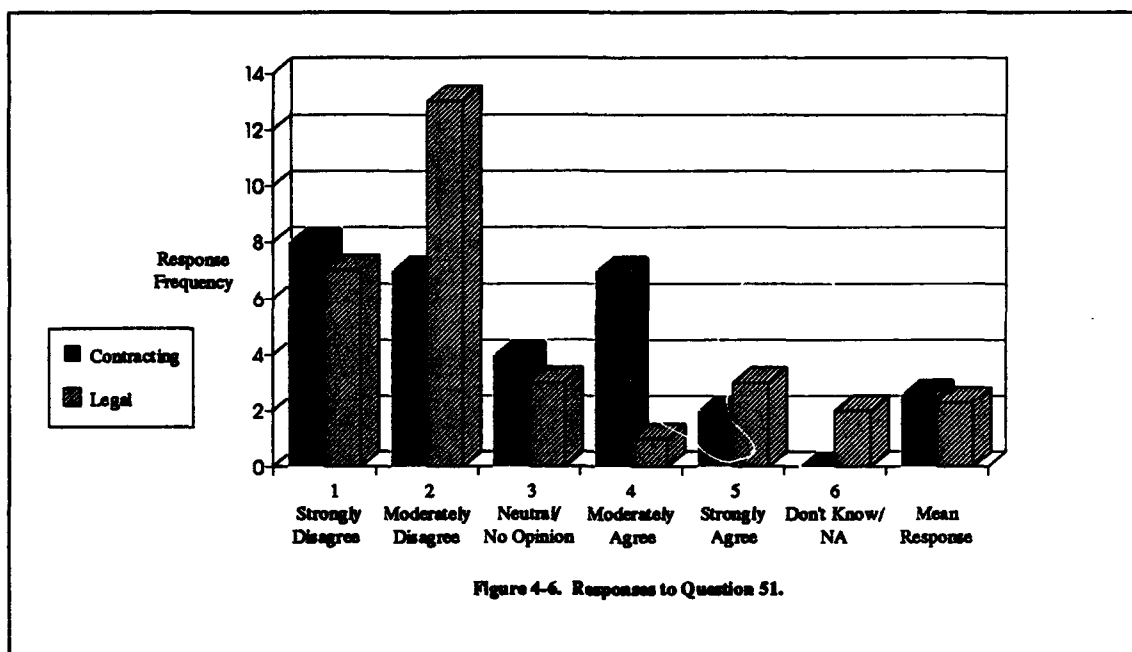


Contracting. Mean: 3.0. Standard deviation: 1.39. Of the responding contracting professionals, 46% disagreed and 36% agreed that they would require management support and encouragement before trying ADR.

Legal. Mean: 2.9. Standard deviation: 1.47. The data reveal a nearly equal percentage of legal professionals disagreeing (38%) and agreeing (35%).

The purpose of this question was to assess the degree of autonomy and confidence perceived by contracting and legal professionals in employing ADR. The data revealed no consensus exists among either group as their response disparities were relatively high.

Question 51: "Once in ADR, it is crucial to reach a settlement."

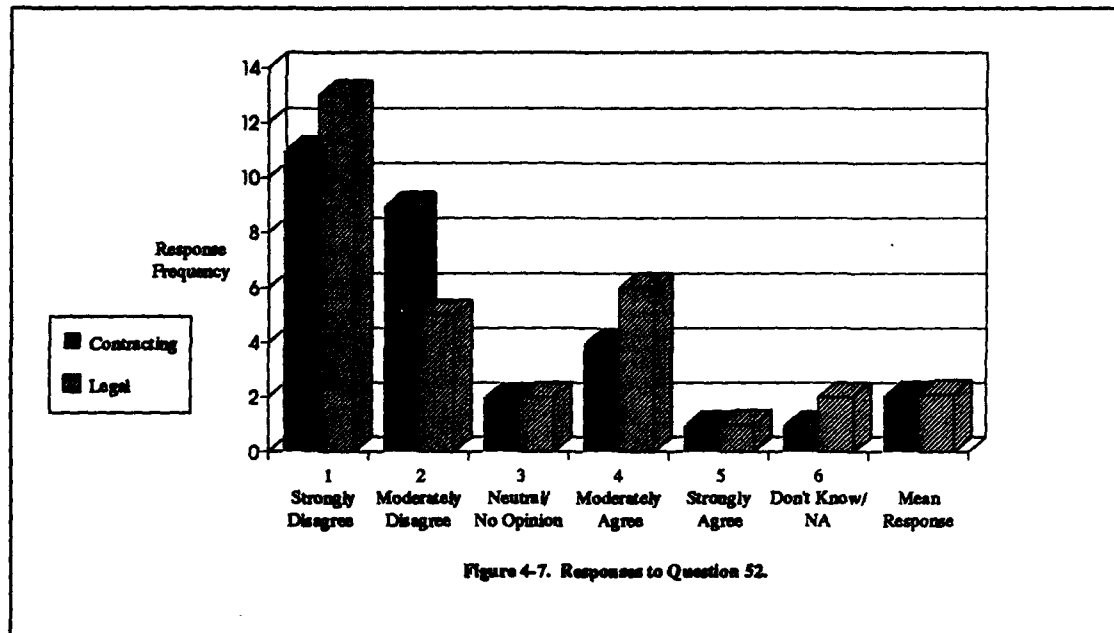


Contracting. Mean: 2.6. Standard deviation: 1.35. Of the contracting respondents, 54% disagreed and 32% agreed that once ADR procedures have been initiated, it is crucial to reach a settlement. The relatively large standard deviation of 1.35 indicates that no consensus exists.

Legal. Mean: 2.3. Standard deviation: 1.23. 69% of the legal professionals disagreed while only 14% agreed that once in ADR, it is crucial to reach a settlement.

The review of literature indicated that some ADR users may be using ADR for "ADR sake" and may not be using it to settle disputes in the best interest of the government. The purpose of this question was to assess the extent contracting and legal professionals feel it is absolutely necessary to reach a settlement after initiating ADR. The data suggest that most respondents disagree that it is crucial to reach a settlement. However, a wide disparity of responses implies the absence of consensus.

Question 52: "Employing ADR and not settling the dispute would reflect negatively of my abilities."

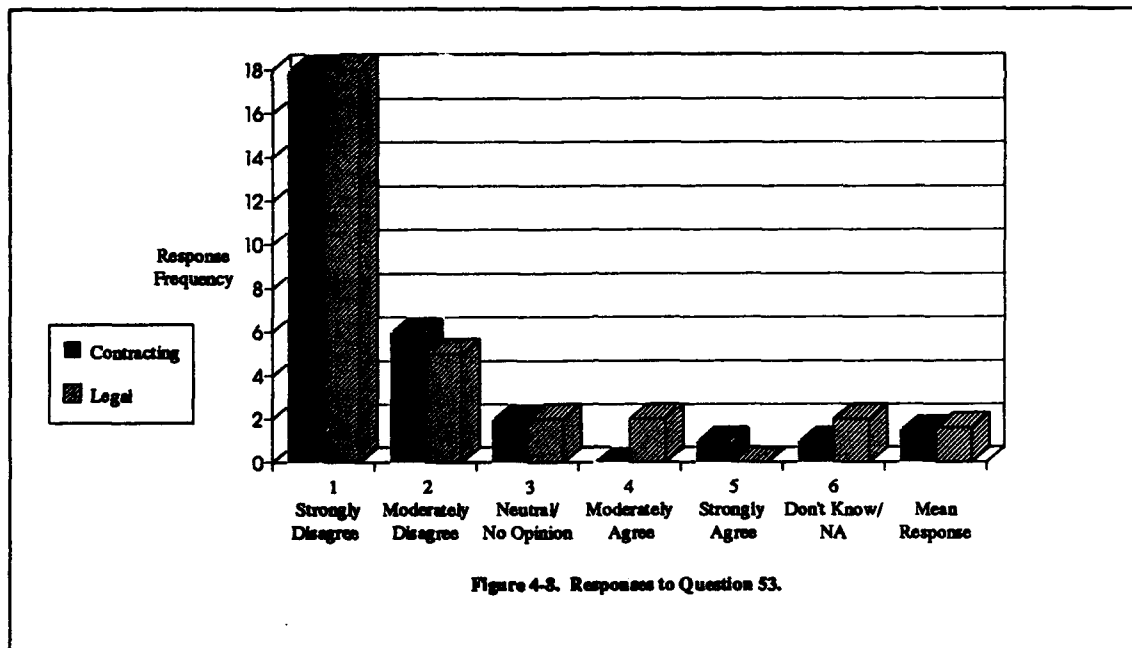


Contracting. Mean: 2.1. Standard deviation: 1.21. Of the contracting respondents, 71% disagreed while 18% agreed that not settling a dispute with ADR would reflect negatively on their abilities.

Legal. Mean: 2.1. Standard deviation: 1.35. 62% of the surveyed legal professionals disagreed and 24% agreed that employing ADR and not settling the dispute would reflect negatively on their abilities.

Similar to Question 51, the purpose of this question was to assess the extent contracting and legal professionals feel pressure to reach a settlement after initiating ADR. The data suggest that most respondents do not feel that failing to reach settlement with ADR would reflect negatively on their abilities. Relatively high standard deviations for both groups indicate a lack of consensus.

Question 53: "I would rather enter into litigation than risk not settling a dispute using ADR."

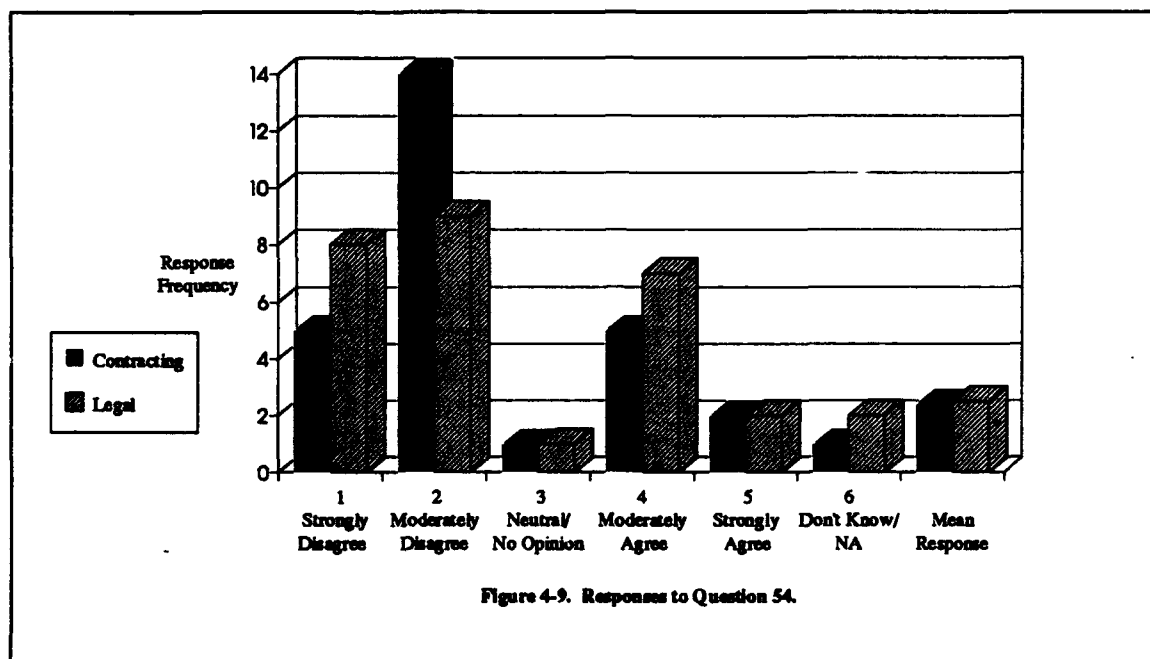


Contracting. Mean: 1.5. Standard deviation: .94. 86% of the contracting respondents did not feel that they would rather enter into litigation than risk not settling a dispute using ADR.

Legal. Mean: 1.6. Standard deviation: .93. The data reveal that 79% of the surveyed legal professionals disagreed with the statement.

The purpose to this question was to assess the extent to which ADR users feel that the risks of not settling outweigh any rewards associated with employing ADR. The data indicate a relatively strong consensus among surveyed professionals that they would not rather enter into litigation than risk employing ADR and not settling the dispute.

Question 54: "Employing ADR opens the risk of higher-level scrutiny of my decisions."

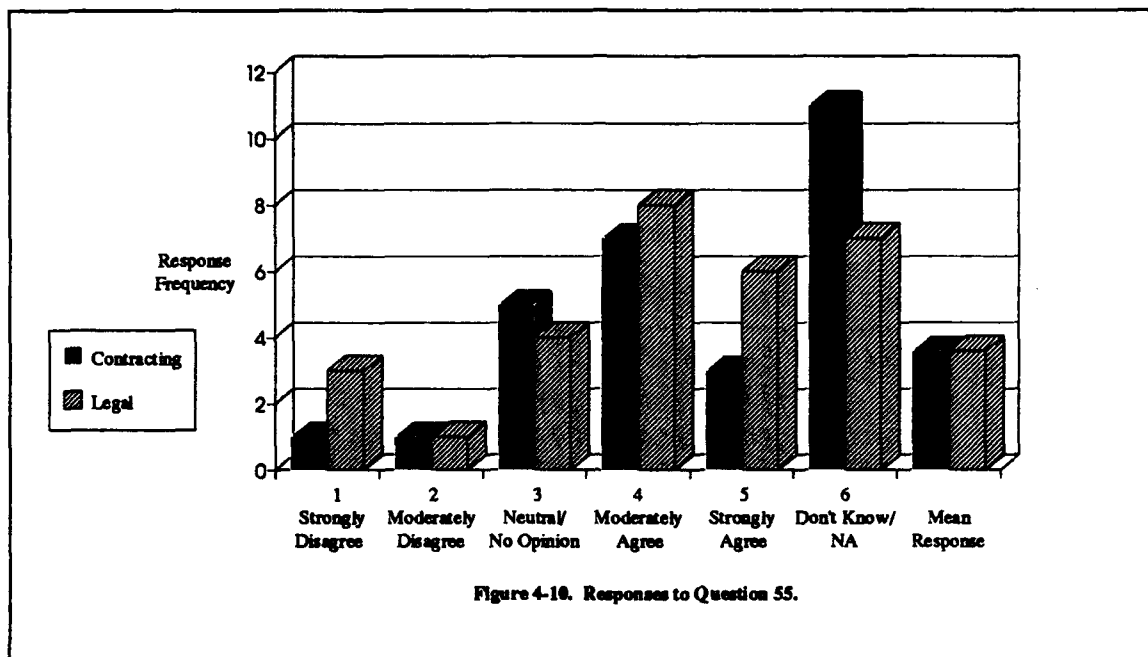


Contracting. Mean: 2.4. Standard deviation: 1.22. Of the surveyed contracting individuals, 68% disagreed and 25% agreed that employing ADR opens the risk of higher-level scrutiny of their decisions.

Legal. Mean: 2.5. Standard deviation: 1.37. 59% of the legal professionals disagreed while 31% agreed that their ADR decisions are subject to higher-level scrutiny.

The review of literature suggested that potential ADR users may feel intimidated by the possibility of higher-level scrutiny, and may therefore choose not to employ ADR. The surveyed data imply that generally, professionals do not believe that employing ADR increases the chance of their decisions meeting higher-level scrutiny. There is, however, a wide disparity of opinions as noted by the relatively high standard deviations.

Question 55: "ADR settlement agreements are subject to an Inspector General (IG) investigation."

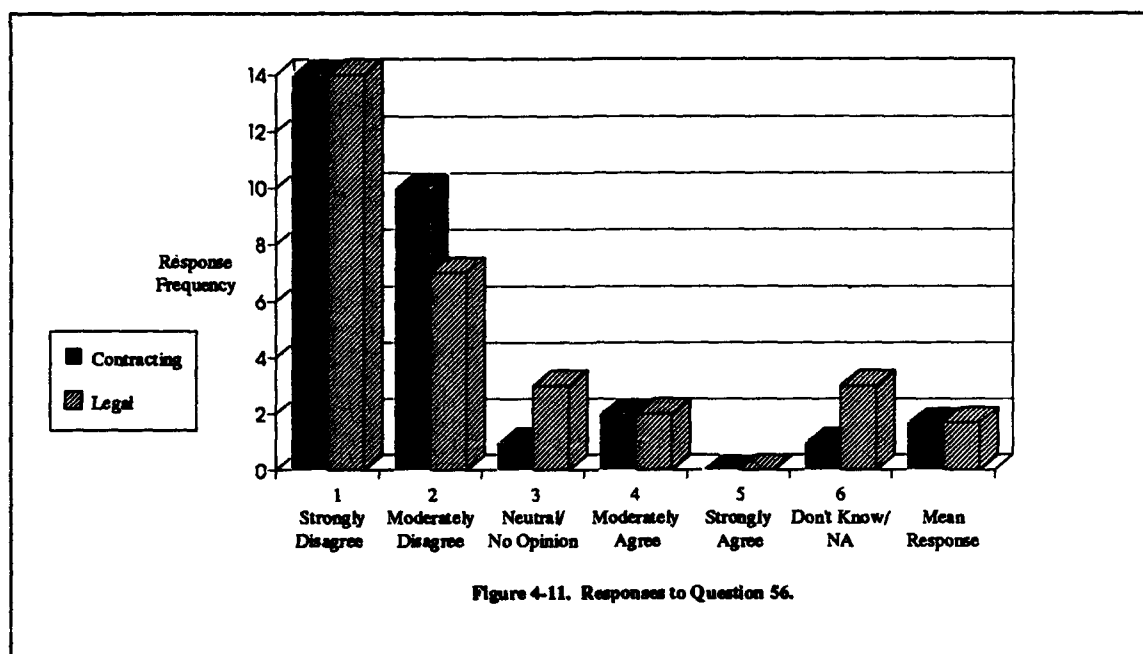


Contracting. Mean: 3.6. Standard deviation: 1.06. Of the surveyed contracting professionals, 7% disagreed, 36% agreed, and 39% answered that they did not know if ADR settlement agreements are subject to IG investigations.

Legal. Mean: 3.6. Standard deviation: 1.33. Of the surveyed legal professionals, 14% disagreed, 48% agreed, and 24% answered that they did not know if ADR settlement agreements were subject to IG investigations.

The purpose of this questions was to assess the degree of awareness of the respondents that their ADR settlement agreements were subject to IG investigations. The review of literature indicated that this was a significant concern with potential ADR users. The data imply that no consensus exists, and most respondents either agreed or did not know.

Question 56: "The possibility of an IG investigation of my ADR settlement agreements would decrease my likelihood of employing ADR."

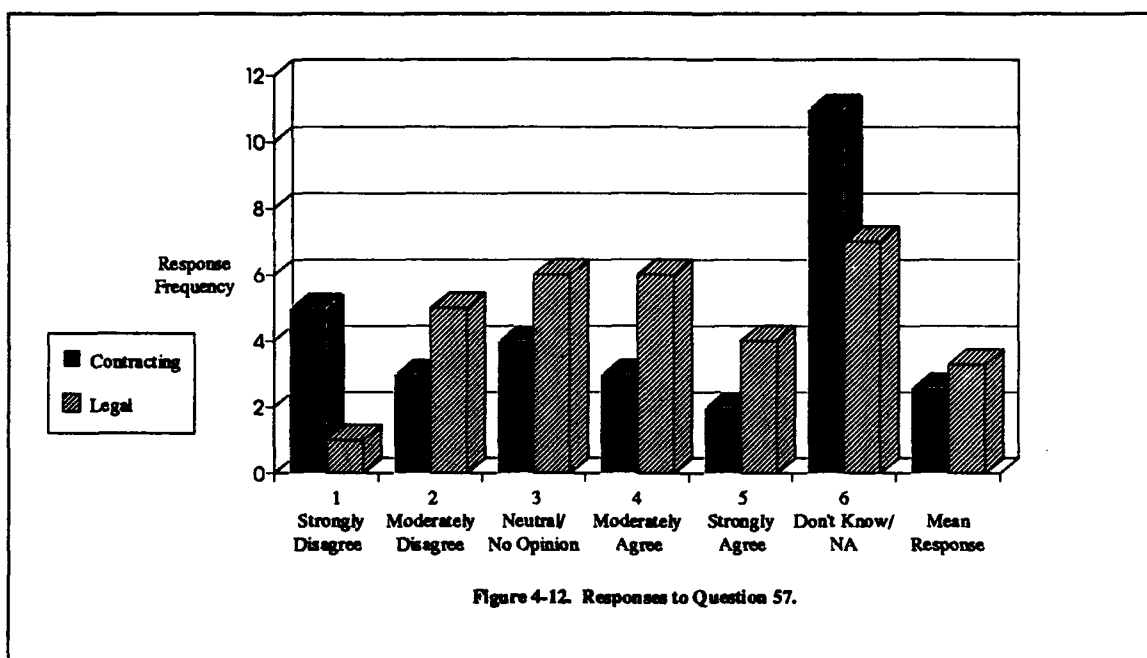


Contracting. Mean 1.7. Standard deviation: .88. 86% of the contracting respondents disagreed that their likelihood of employing ADR would decrease with the possibility of an IG investigation.

Legal. Mean: 1.7. Standard deviation: .96. Of the legal respondents, 72% said that their decision to employ ADR would not be affected by the possibility of an IG investigation of their settlement agreement.

The review of literature revealed that potential ADR users may limit their employment of ADR due to the possibility of investigations of their settlement agreements by the IG. The data imply that the surveyed respondents would not, however, lessen their employment of ADR with the knowledge of possible IG investigations.

Question 57: "ADR settlement agreements are subject to Defense Contract Audit Agency (DCAA) audits."

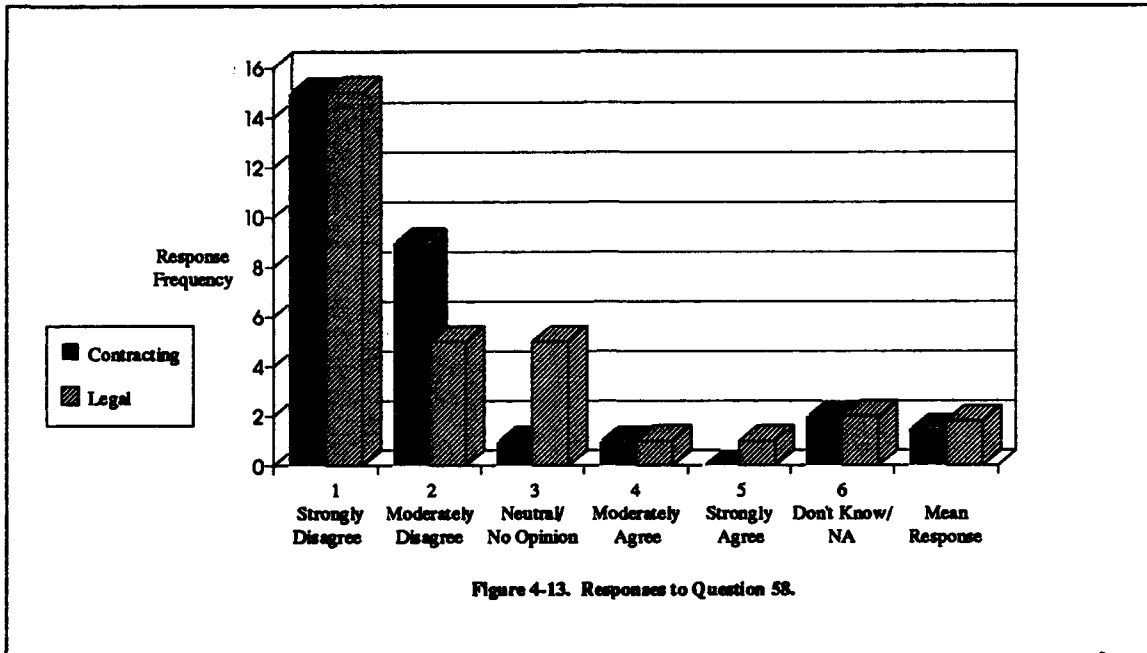


Contracting. Mean: 2.6. Standard deviation: 1.41. Of the contracting respondents, 29% disagreed, 18% agreed, and 39% answered that they did not know if ADR settlement agreements are subject to DCAA audits.

Legal. Mean: 3.3. Standard deviation: 1.17. Of the legal respondents, 21% disagreed, 34% agreed, and 21% answered that they did not know.

The purpose of the question was to assess the degree of respondent knowledge that ADR settlement agreements are subject to DCAA audits. The data indicate that no prominent consensus exists among the respondents as to this fact.

Question 58: "The possibility of a DCAA audit of my ADR settlement agreements would decrease my likelihood of employing ADR."

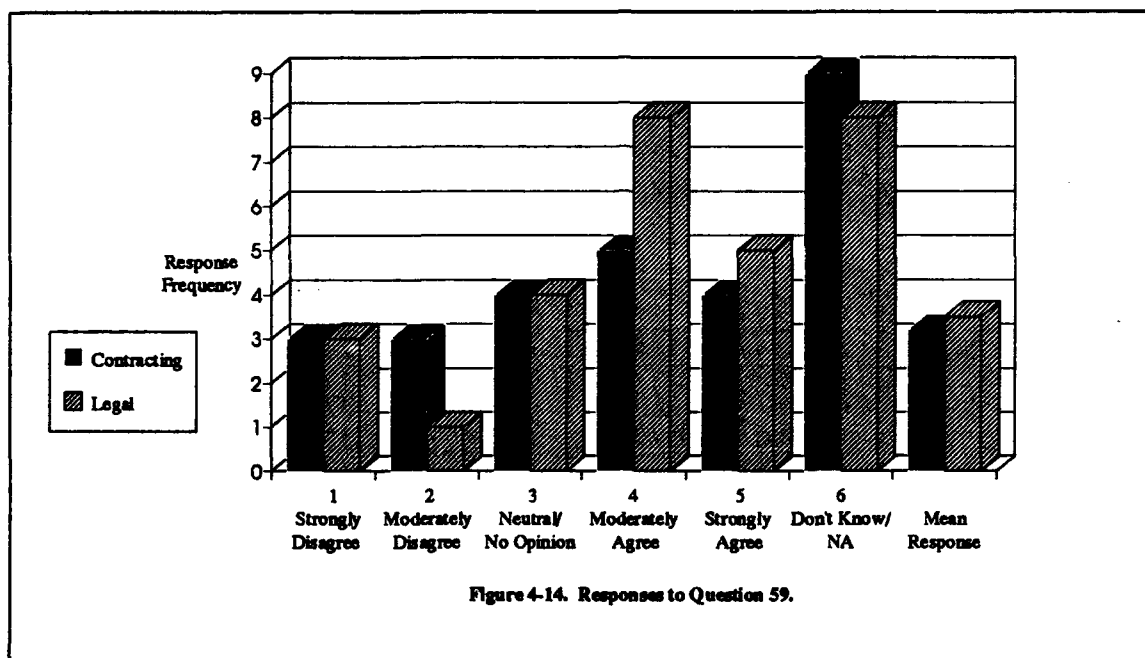


Contracting. Mean: 1.5. Standard deviation: .76. The data reveal that 82% of the contracting professionals disagreed that the possibility of a DCAA audit of their settlement agreements would decrease their likelihood of employing ADR.

Legal. Mean: 1.8. Standard deviation: 1.11. Of the surveyed legal professionals, 69% said that their likelihood of employing ADR would not decrease with the possibility of a DCAA audit.

The literature review revealed that potential ADR users decisions to employ ADR may be effected by the possibility of a DCAA audit of their settlement agreement. The purpose of this question was to assess the extent to which this was true among surveyed individuals. The data suggest that a strong consensus is held among those respondents that the possibility of DCAA audits would not decrease their likelihood of employing ADR.

Question 59: "ADR settlement agreements are subject to Congress/General Accounting Office (GAO) oversight."

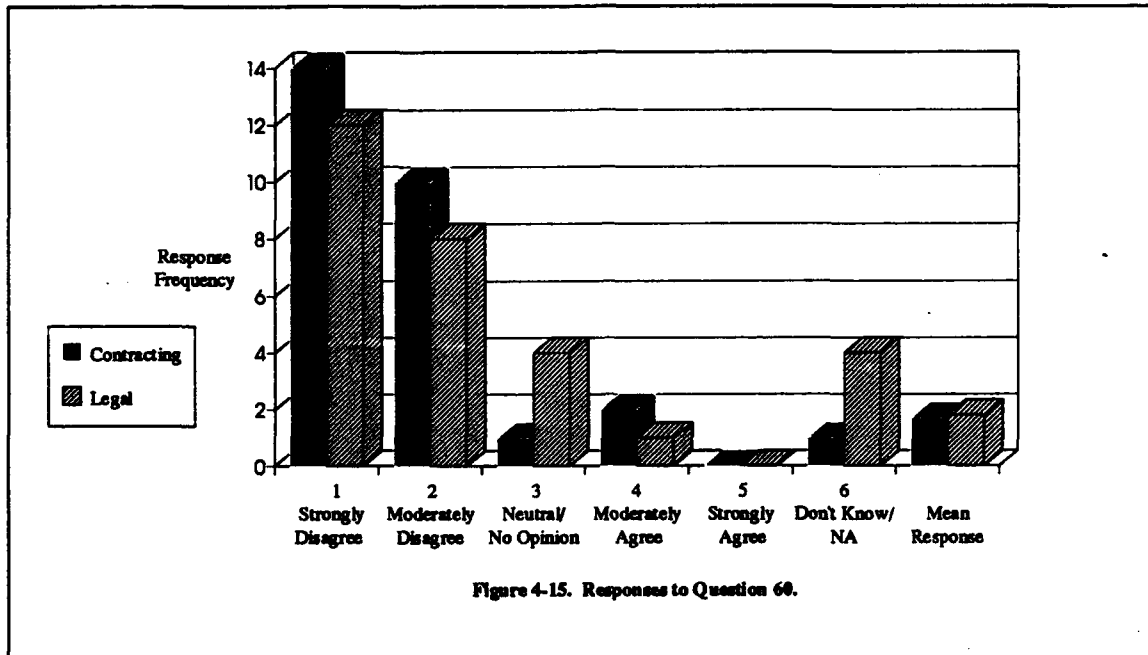


Contracting. Mean: 3.2. Standard deviation: 1.4. Of the contracting respondents, 21% disagreed, 32% agreed, and 32% answered that they did not know if ADR settlement agreements were subject to Congressional and GAO oversight.

Legal. Mean: 3.5. Standard deviation: 1.33. Of the legal respondents, 21% disagreed, 31% agreed, and 28% answered that they did not know of the possibility of oversight.

The purpose of this question was to assess the degree of respondent awareness with regard to the possibility of Congressional and GAO oversight of their ADR settlement agreements. The data illustrate a wide dispersion of responses with no clear consensus of opinion.

Question 60: "The possibility of Congress/GAO oversight of my ADR settlement agreements would decrease my likelihood of employing ADR."

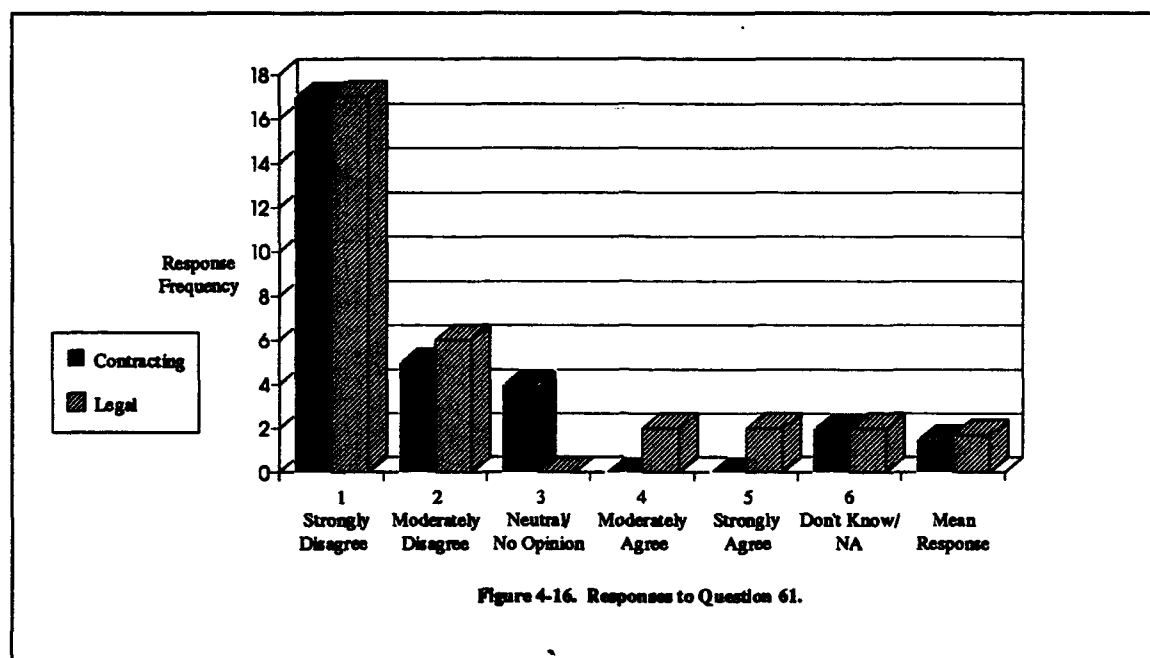


Contracting. Mean: 1.7. Standard deviation: .88. 86% of the contracting respondents disagreed that the possibility of Congressional and GAO oversight would lessen their likelihood of employing ADR.

Legal. Mean: 1.8. Standard deviation: .88.. The data reveal that 69% of the legal respondents did not feel that the possibility of this oversight would decrease their likelihood of employing ADR.

Some literature suggested that the possibility of Congressional and/or GAO oversight of ADR settlement agreements may decrease ADR employment. The purpose of this questions was to assess the degree to which this oversight does affect employment of ADR. The data suggest that the possibility of Congressional and/or GAO oversight does not decrease the likelihood of employing ADR by contracting and legal professionals.

Question 61: "Employing ADR would shift settlement authority and dispute decision making from the CO to the legal counsel."



Contracting. Mean: 1.5. Standard deviation: .76. Of the contracting respondents, 79% disagreed and none agreed that employing ADR would shift settlement authority from the CO to the legal counsel.

Legal. Mean: 1.7. Standard deviation: 1.26. Of the legal respondents, 79% disagreed and 14% agreed that employing ADR would indeed shift authority from the CO to the legal counsel.

The review of literature suggests that potential ADR users may be reluctant to employ ADR because they may feel that doing so might shift settlement authority from the CO to the legal counsel. The purpose of this question was to assess the degree to which the survey participants believed this to be true. The data suggest that the contracting community overwhelming does not believe the settlement authority would shift to legal

counsel. Similarly, the legal respondents felt that the *settlement authority would not shift*. There was, however, a relatively large response dispersion among legal professionals.

Question 62: "Please share your thoughts regarding any personal benefits you might receive for employing ADR." The purpose of this question was to assess the respondents' perceptions as to any benefits they may receive for employing ADR, other than those mentioned in several of the closed-ended (Likert) questions. The most notable and frequently answered responses were that ADR provided the personal benefits of: personal satisfaction of doing a job well done; beneficial to career; and, resultant time savings afforded to work on other responsibilities.

Question 63: "Please share your thoughts regarding any personal detriments that may discourage you from employing ADR." As noted in Chapter 2 of this report, a negative perception of using ADR is that it may be personally detrimental to those individuals who employ it. The purpose of this question was to give the respondents an opportunity to narrate their perceptions of possible detriments. Only 31% of the respondents answered this question. Interestingly, of those respondents who answered the question, most noted that they perceived *no* personal detriments that discourage them from employing ADR.

Of those respondents who noted that they perceived personal detriments in using ADR, four said that they would be viewed as failures if a settlement was not reached. Other frequently noted detriments included: management's failure to support in light of a settlement investigation, and pressure to settle - viewed as a failure if settlement not reached. One attorney noted that because ADR involves out of court settlements, he would not be given as much credit for dispute resolution effort through ADR as with litigation. He said that presenting a case in front of a judge was viewed by his management as more valuable than merely settling with a contractor.

The responses to this question indicate that few surveyed contracting and legal professionals perceive any personal detriments as a direct result of using ADR that would discourage their employment of ADR techniques.

Summary Analysis of Investigative Question 4. The purpose of this section is to assess the extent ADR users perceive any personal benefits or detriments by employing ADR to resolve contract disputes. *In general, the data indicate that the surveyed contracting and legal professionals do perceive various personal benefits, but do not perceive personal detriments from their employment of ADR.*

Most respondents agreed that employing ADR would show initiative and successful dispute resolution would reflect positively on their performance reports. However, the surveyed professionals did not agree that their successful employment of ADR would increase their chances for promotion.

The data also indicate that in general, the surveyed professionals do not feel pressure to settle after attempting ADR. Some respondents noted that they believe ADR was sometimes being employed, "for ADR sake," often when it was not appropriate.

With regard to perceived detriments from employing ADR, the data indicate that neither the contracting or legal respondents perceive any negative consequences as a result of their initiating ADR to settle contract disputes.

In this chapter, the researchers presented the data captured by the survey, and provided interpretation discussion of these data for each survey question. The data were analyzed to reveal trends, consensus and disparity among contracting and legal professionals. In the following chapter, the researchers provide recommendations based upon these findings.

V. Recommendations and Conclusions

Based on the research findings, this chapter presents recommendations to maximize the effectiveness of the ADR process, and provides recommendations to promote expansive, appropriate use of ADR.

Recommendation #1: Increase ADR Marketing

The researchers recommend further expansion of ADR marketing efforts by increasing publicity and gathering empirical evidence to promote ADR benefits. This data revealed that many contracting and legal professionals believe that more publicity of ADR "success stories" and "lessons learned" could increase their propensity to employ ADR. The study also revealed a lack of empirical evidence to support ADR claims of time and cost savings. As a result, contracting and legal professionals may not be convinced that trying this relatively new and unfamiliar process will actually reward them with benefits. Both of these types of information should be disseminated through all possible means, including training sessions, agency publications, distributions, and electronic mail.

Recommendation #2: Enhance ADR Training

While a clear majority of the sampled population considered themselves to be adequately trained and would employ ADR even without formal training, the data revealed that a substantial number of contracting and legal professionals desire additional ADR training. Specifically, the data suggested a need for the training courses to discuss the authority and roles of contracting officers and the attorneys, describe the different types of ADR, and present examples of when to employ each type. The researchers believe that when ADR users are well trained, their propensity to employ ADR increases.

Recommendation #3: Increase ADR Incentives

The data indicate that the majority of the sample population is not influenced by the potential disincentives listed in Chapter 2 when considering ADR use. This suggests that, when designing an ADR implementation plan, emphasis need not be placed on minimizing disincentives such as IG investigations, and GAO and DCAA audits. However, the researchers believe it is essential that managers fully support their subordinates' ADR settlement decisions in order to minimize the negative impact these disincentives may impose.

The researchers recommend increasing the use of incentives to encourage potential users to employ ADR. Increasing the use of incentives such as performance awards, public recognition, monetary bonuses, and ADR career performance evaluation criteria, should increase the willingness to employ ADR. It is important, however, that these incentives be structured in such a way that they do not reward the use of ADR in inappropriate situations.

Recommendation #4: Increase the Use of Partnering

The researchers recommend that the "partnering" concept be promoted to the maximum extent practicable. Many respondents noted that their experiences with partnering drastically reduced their number of contract disputes and ill-will between the government and the contractors. Based on these findings, the researchers recommend incorporating the partnering concept in all applicable contracts. Successful use of partnering could drastically reduce the number of contract disputes, and therefore, minimize the need for any dispute resolution technique.

Recommendation #5: Avoid Over-Regulating ADR Procedures.

In general, most respondents agreed that there currently exists a sufficient level of ADR guidance. In addition, most agreed that legal counsel has sufficient expertise in

assessing the validity of ADR settlements. These data suggest that ADR users feel comfortable operating within the current level of ADR procedures. Based on the findings, the researchers recommend that policy makers avoid over-regulating the ADR process, and implement ADR policies and procedures in the form of "skeleton" guidance. This means that any agency-prescribed procedures for implementing the various ADR techniques should only be *general* in direction, absent of strict guidelines.

The ADR user's decision making process and implementation procedures should not be "overbureaucratized" with required paperwork and higher-level reviews, but should instead allow flexibility, creativity and autonomy at the lowest possible levels. Generally, contracting and legal professionals who employ ADR, know the details of their disputes better than higher-level reviewers. The researchers believe that pushing autonomy of ADR settlement authority to the actual users would not only encourage wider employment of ADR techniques, but would result in better settlements.

Recommendations for Further Research

The following recommendations for future research are offered by the researchers

(1) A redistribution of this survey (or a similar one) to identify and assess the factors that influence ADR implementation, as they change with time. This type of longitudinal study would provide ADR policy makers feedback from the ADR users regarding the effectiveness and perceptions of ADR implementation policies, and would enable the designers to make appropriate revisions to further promote appropriate employment of ADR.

(2) A determination of ADR settlement data that should be measured and collected in order to quantify the time and cost savings claimed by using ADR. At this time, empirical data that allows comparison between settlement times and costs through ADR and traditional litigation is nearly nonexistent. If gathered, this data could be used

to assess the success of various ADR techniques and would provide hard evidence for marketing and promotional campaigns.

(3) Consider expanding awareness and use of Partnering as a method to improve relations between the Government and contractors. This research could assess the perceptions of individuals experienced with the use of partnering, and could, if applicable, make recommendations to improve its effectiveness.

Conclusion

ADR policy makers should give maximum consideration to expanded ADR implementation to resolve post-award contract disputes. ADR offers contracting and legal professionals an avenue to settle in *months* what might require *years* through traditional litigation. Disputes addressed via ADR facilitate a less confrontational government/contractor relationship, and reach a solution at lower costs than litigation. In addition, the contracting and legal professionals who have used ADR *like it*, and would use it again.

At this time, contracting and legal professionals do not consider oversight, second-guessing, audit reports, fear of case disclosure, or lack of management support to be barriers to their use of ADR. However, to accelerate the growth of ADR implementation, policy makers should incorporate various incentives which encourage ADR use, as well as increase marketing of ADR success stories and realized benefits. Finally, policy makers must avoid over-regulating ADR procedures and maintain settlement decision authority at the contract officer level. Consideration of these recommendations will contribute toward expanding the implementation and effectiveness of ADR in resolving contract disputes.

Appendix A: Survey



DEPARTMENT OF THE AIR FORCE
AIR UNIVERSITY
AIR FORCE INSTITUTE OF TECHNOLOGY

16 MAY 1994

MEMORANDUM FOR: SURVEY PARTICIPANTS

FROM: Department of Government Contract Law (AFIT/LSL)
Bldg 641
2950 P Street
WPAFB OH 45433-7765

SUBJECT: Alternative Dispute Resolution Survey

1. As stated in the DOD General Counsel Memorandum dated 18 Feb 94, increased use of Alternative Dispute Resolution (ADR) techniques was made Federal policy by the Administrative Dispute Resolution Act of 1990. This policy was strongly endorsed by the National Performance Review, and the DOD General Counsel has urged that efforts be made within DOD to fully exploit ADR.
2. The Department of Government Contract Law, Air Force Institute of Technology (AFIT), is sponsoring an academic study how ADR may be implemented for maximum effectiveness in resolving government contract disputes. I am writing to request your cooperation.
3. The attached survey is provided to DOD professionals who have ADR experience or knowledge. Your voluntary participation will be greatly appreciated. Responses and recommendations will be analyzed and used to develop a more thorough understanding of the ADR process. All responses are completely confidential.
4. Please return your completed survey in the self-addressed envelope no later than 8 June, 1994. Any questions should be addressed to Capt Brad Riddle or 1Lt Jeff Journey. They both can be reached at DSN: 785-7777, ext 2320, or Commercial: (513) 255-7777, ext 2320.
5. Thank you for your help in this important effort.

ROBERT J. WEHRLE-EINHORN
Head, Dept of Government Contract Law
School of Systems and Logistics

- 2 Atchs
1. ADR Survey
 2. Survey Return Envelope

The purpose of this study is to identify and assess the impact of possible factors that may encourage or discourage contracting and legal personnel from employing Alternative Disputes Resolution (ADR) to resolve contract disputes. Completion of this survey should take approximately 15-20 minutes. Your responses are completely anonymous.

INSTRUCTIONS

Please read each statement or question carefully and write in the number corresponding to the scaled response that most accurately describes your feelings and perceptions. Please note the following definitions when considering your responses:

ADR - Any or all ADR techniques such as negotiation, conciliation, mediation, arbitration, mini-trials, or any combination of procedures employed to resolve post-award contract disputes in lieu of litigation.

Employment of ADR - This phrase should be understood to mean the use of ADR in "appropriate" cases - when the use of ADR techniques is determined reasonable by legal counsel and contracting officers for the resolution of contract disputes.

Management - Your direct supervisor (boss) and/or individual who has primary input to your performance evaluation.

SECTION 1

The purpose of this section is to determine the extent users of ADR believe Management would support their decision to employ ADR. Please answer the statements with the number corresponding to the most appropriate response.

Strongly Disagree	Moderately Disagree	Neutral/ No Opinion	Moderately Agree	Strongly Agree	Don't Know/ Does Not Apply
1	2	3	4	5	6

- ___ 1. Management understands the concept of ADR.
- ___ 2. Management has received ADR training.
- ___ 3. Management has had actual experience using ADR.
- ___ 4. Management has encouraged personnel in my office to use ADR.
- ___ 5. Management has encouraged me to employ ADR.
- ___ 6. When considering whether or not to employ ADR, management offers me assistance.
- ___ 7. Management supports employing ADR.
- ___ 8. Management supports sending personnel to get ADR training.
- ___ 9. Management supports "In-house" ADR training.
- ___ 10. Management supports candid feedback regarding ADR.
- ___ 11. Management has publicly praised successful ADR use.
- ___ 12. ADR use will increase over the next two years.
- ___ 13. Please share your thoughts regarding what action management and/or policy makers could take to encourage wider employment of ADR. _____

SECTION 2

The purpose of this section is to determine the extent users of ADR believe sufficient guidance and legal counsel is available to assist them in an ADR case. Please answer the statements with the number corresponding to the most appropriate response.

Strongly Disagree 1	Moderately Disagree 2	Neutral/ No Opinion 3	Moderately Agree 4	Strongly Agree 5	Don't Know/ Does Not Apply 6
---------------------------	-----------------------------	-----------------------------	--------------------------	------------------------	------------------------------------

- _____ 14. A sufficient number of "experts" are available for me to contact for ADR advice.
- _____ 15. I am likely to seek ADR advice from contracting experts.
- _____ 16. I am likely to seek ADR advice from legal counsel.
- _____ 17. Legal counsel has sufficient expertise to assist me in employing ADR.
- _____ 18. An agency ADR point-of-contact {also known as the Alternative Dispute Resolution Specialist (ADRS)}, would be beneficial as a means of obtaining ADR guidance.
- _____ 19. I would seek guidance from an ADRS for assistance in possible ADR cases.
- _____ 20. I would not try ADR without formal ADR training.
- _____ 21. I am adequately trained to employ ADR
- _____ 22. I have tried ADR as a direct result of knowledge gained from training.
- _____ 23. I don't feel formal training is required to successfully use ADR.
- _____ 24. My office is familiar with ADR procedures.
- _____ 25. There is sufficient written guidance available which explains ADR procedures.
- _____ 26. At my current level of experience and/or training, I believe I could effectively employ ADR techniques to resolve contract disputes.
- _____ 27. I would avoid trying ADR because of a lack of formal implementation structure.

28. Please share your feelings regarding whether the current level of ADR training, guidance, legal counsel encourages or discourages you from employing ADR; and, in which areas do you have recommendations for improvement.

SECTION 3

The purpose of this section is to determine the extent users of ADR believe ADR is an efficient and effective method of dispute settlement. Please answer the statements with the number corresponding to the most appropriate response.

Strongly Disagree 1	Moderately Disagree 2	Neutral/ No Opinion 3	Moderately Agree 4	Strongly Agree 5	Don't Know/ Does Not Apply 6
---------------------------	-----------------------------	-----------------------------	--------------------------	------------------------	------------------------------------

- ___ 29. I believe that ADR is less time consuming than resolving disputes through litigation.
- ___ 30. I feel that ADR is less costly than resolving disputes through litigation.
- ___ 31. Contractors will agree to employing ADR to settle contract disputes.
- ___ 32. Contractors will recommend employing ADR to settle contract disputes.
- ___ 33. I feel that ADR will facilitate better Government/contractor relationships than resolving disputes through litigation.
- ___ 34. Settling a contract dispute using ADR results in compromise by both parties.
- ___ 35. If a dispute is not settled using ADR and proceeds to litigation, the respective parties' cases have been exposed.
- ___ 36. ADR settlement agreements are equally as binding/enforceable as a judge's decision rendered through litigation.
- ___ 37. All things considered, I feel that ADR (used in appropriate situations) can be a better means to resolve contract disputes than litigation.
- ___ 38. I would rather try to settle a dispute by employing ADR than by immediately proceeding with litigation.
- ___ 39. Given my training and/or experience with ADR, I would likely recommend its use to others.
- ___ 40. My program manager influences my decision to employ ADR.
- ___ 41. DCAA auditors influence my decision to employ ADR.
- ___ 42. Engineers/technical representatives influence my decision to employ ADR.
- ___ 43. Legal counsel influences my decision to employ ADR.

44. Settling disputes with ADR allows the government and the contractors to reach a more beneficial settlement than through litigation. Do you agree or disagree, and why?.

45. Do you have any recommendations for preventing and/or resolving disputes?

SECTION 4

The purpose of this section is to determine if the users of ADR perceive any personal benefits or detriments by employing ADR to resolve disputes. Please answer the statements with the number corresponding to the most appropriate response.

Strongly Disagree	Moderately Disagree	Neutral/ No Opinion	Moderately Agree	Strongly Agree	Don't Know/ Does Not Apply
1	2	3	4	5	6

- ___ 46. Employing ADR to settle a dispute would show personal initiative, even if a settlement was not reached.
- ___ 47. Employing ADR would reflect positively on my performance report.
- ___ 48. I would receive recognition for successfully employing ADR to resolve contract disputes.
- ___ 49. Resolving disputes using ADR will likely increase my chances for promotion.
- ___ 50. Before trying ADR, I would require encouragement and support from Management.
- ___ 51. Once in ADR, it is crucial to reach a settlement.
- ___ 52. Employing ADR and not settling the dispute would reflect negatively of my abilities.
- ___ 53. I would rather enter into litigation, than risk not settling a dispute using ADR.
- ___ 54. Employing ADR opens the risk of higher-level scrutiny of my decisions.
- ___ 55. ADR settlement agreements are subject to an Inspector General (IG) investigation.
- ___ 56. The possibility of an IG investigation of my ADR settlement agreements would decrease my likelihood of employing ADR.
- ___ 57. ADR settlement agreements are subject to Defense Contract Audit Agency (DCAA) audits.
- ___ 58. The possibility of a DCAA audit of my ADR settlement agreements would decrease my likelihood of employing ADR.
- ___ 59. ADR settlement agreements are subject to Congress/General Accounting Office (GAO) oversight.
- ___ 60. The possibility of Congress/GAO oversight of my ADR settlement agreements would decrease my likelihood of employing ADR.
- ___ 61. Employing ADR would shift settlement authority and dispute decision making from the CO to the legal counsel
62. Please share your thoughts regarding any personal benefits you might receive for you employing ADR. _____
- _____
- _____
63. Please share your thoughts regarding any personal detriments that may discourage you from employing ADR. _____
- _____
- _____
- _____

DEMOGRAPHICS

The purpose of this section is to classify the data obtained from the responses. NOTE: The researchers are not concerned with identifying responses to respondents.

64. In what agency (Army, Navy, Air Force, Army Corps of Engineers, DLA, etc.) do you currently work? _____

65. What is your current job title? _____

66. What are your primary responsibilities? _____

67. How many years of acquisition experience do you have?

1. None
2. 1-5
3. 6-15
4. More than 15

68. How many people do you supervise?

1. None
2. 1-10
3. 11-30
4. More than 30

69. With how many contracts are you directly involved?

1. None
2. 1-5
3. 6-15
4. More than 15

70. What is the approximate annual total dollar value of those contracts?

1. \$1-\$500k
2. \$500k-\$5M
3. \$5M-\$50M
4. \$50M-\$500M
5. More than \$500M

71. Approximately how many post award contract disputes are you involved with annually?

1. None
2. 1-3
3. 4 -10
4. More than 10

COMPLETION INSTRUCTIONS

Thank you very much for your time and effort in completing the survey. Your inputs will help to maximize the effectiveness of the ADR process. Please place the completed survey in the return envelope and drop it in a convenient mailbox.

Appendix B: Survey Respondent Demographics

1. Agencies in which the Respondents Worked:

Army	44%
Army Corps of Engineers	56%
Navy	0%

2. Respondents Profession:

Contracting	49%
Legal	51%

3. Respondents Years of Acquisition Service:

None	0%
1-5	0%
6-15	19%
More than 15	81%

4. Number of People Respondents Supervised:

None	19%
1-10	25%
11-30	23%
More than 30	19%

5. Number of Contracts Responsible for:

(*One respondent did not answer this question)

None	4%
1-5	7%
6-15	7%
More than 15	79%

6. Value of Contracts Responsible for:
(*Three respondents did not answer this question)

\$1-500K	2%
\$500K-5M	2%
\$5M-50M	19%
\$50M-500M	42%
More than \$500M	30%

7. Number of Annual Contract Disputes per Respondent:

None	7%
1-3	12%
4-10	37%
More than 10	44%

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Vita

Captain Jeffrey T. Journey was born on 2 December 1967 in Atkinson, Nebraska. He graduated from North Platte High School in North Platte, Nebraska in 1986 and attended the U.S. Air Force Academy, graduating with a Bachelor of Science in Management in May 1990. Upon graduation he received a regular commission in the USAF and served his first tour of duty at Nellis AFB, Nevada. He began as a buyer and contract administrator for the 554th Contracting Squadron where he negotiated and purchased commodities, base Civil Engineering, construction and service requirements. He was then chosen for a short tour as the Chief of Contracting, Riyadh AB, Kingdom of Saudi Arabia, where he managed the procurement of supplies and services for the 4409th Operational Support Group, and negotiated with Saudi Ministry of Defense and Aviation officials for continued Assistance-in-Kind support of deployed U.S. troops. He then served as contract administrator for the Nellis Range Maintenance contract. In this capacity he was responsible for administration of funding and requirement modifications for the multi-million dollar contract. Upon graduation from AFIT in September 1994, Captain Journey will be assigned to the Propulsion SPO, Aeronautical Systems Center, Air Force Material Command, Wright-Patterson AFB, Ohio.

Permanent Address: 1141 Patterson Road,
Dayton Ohio, 45420

Vita

Captain Brad Riddle was born on 2 May 1967 at Fort Jackson, South Carolina. He graduated from Klien Oak High School in Spring, Texas in 1985, and attended the University of Washington. He graduated in June 1989 with a Bachelor of Arts in Economics, as a Distinguished Graduate of the Air Force ROTC program, and received a regular commission. In his first assignment, he served as contract negotiator for the Wright Laboratory's Flight Dynamics and Cockpit Integration Labs (Wright-Patterson AFB, AFMC). Here, he worked acquisition issues for flat panel cockpit displays, thrust-vectoring engines, and vehicle subsystem integrity, as well as for the Strategic Defense Initiative (SDI), and various classified programs. In January 1992, Captain Riddle served in the Training Systems SPO (Wright-Patterson AFB, AFMC) as a member of the source selection team for the \$50 million Simulator for Electronic Combat (SECT). Following the SECT award, he became the lead buyer for the C-141 Aircrew Training System team. Here, he negotiated the acquisitions for simulator upgrades and increased student throughput to accommodate the need for additional, trained aircrews during Desert Storm. In June 1992, Captain Riddle was selected to serve as the Executive Officer to the Director of Contracting, Contracting Directorate at the Aeronautical Systems Center (AFMC, Wright-Patterson AFB). In this capacity, he served as the liaison and action officer between senior acquisition officials from government and industry and the Director. Upon graduation from AFIT, Captain Riddle will be assigned to the Space and Missile Systems Center, Los Angeles Air Station, California.

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REPORT DOCUMENTATION PAGE

Form Approved
OMB No. 0704-0188

Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188), Washington, DC 20503.

1. AGENCY USE ONLY (Leave blank)		2. REPORT DATE September 1994	3. REPORT TYPE AND DATES COVERED Master's Thesis
4. TITLE AND SUBTITLE AN ASSESSMENT OF FACTORS THAT AFFECT THE EMPLOYMENT OF ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES TO RESOLVE CONTRACT DISPUTES			5. FUNDING NUMBERS
6. AUTHOR(S) Jeffrey T. Journey, Captain USAF Bradley T. Riddle, Captain USAF			
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Air Force Institute of Technology, WPAFB OH 45433-6583			8. PERFORMING ORGANIZATION REPORT NUMBER AFIT/GCM/LAR/94S-4
9. SPONSORING / MONITORING AGENCY NAME(S) AND ADDRESS(ES) AFIT/LSL Bldg. 642 2950 P St. WPAFB OH, 45433-7765			10. SPONSORING / MONITORING AGENCY REPORT NUMBER
11. SUPPLEMENTARY NOTES			
12a. DISTRIBUTION / AVAILABILITY STATEMENT Approved for public release; distribution unlimited			12b. DISTRIBUTION CODE
13. ABSTRACT (Maximum 200 words) This study investigated the factors which potentially influence contracting and legal professionals' decisions to employ Alternative Dispute Resolution (ADR) techniques to resolve contract disputes. A literature review revealed that unawareness, excessive oversight, lack of management support, over-regulation, and interdisciplinary conflict on acquisition teams are or have been the most prominent factors discouraging the use of ADR. An additional background investigation determined that the United States Army, the Army Corps of Engineers, and the Navy had extensive experience and expertise regarding ADR use. Therefore, surveys (over 250) were administered to various contracting and legal offices throughout these agencies, of which 57 were returned. The majority of the respondents indicated that except for unawareness, these factors imparted very little influence on their decision to employ ADR. Regarding unawareness, the data indicated a specific need for improvement in areas of training and publicity. For the training sessions, the respondents suggested ADR experts discuss the different types of ADR and under what circumstances to use them, as well as provide general guidelines for ADR implementation. With regard to publicity, the respondents indicated a need for more dissemination of "success stories" and "lessons learned" throughout their agencies in order to strengthen contracting and legal personnel's proficiency for employing ADR. Generally, the respondents indicated that the current dispute resolution environment is promoting the use of ADR to resolve contract disputes, and that its use will increase over the next few years.			
14. SUBJECT TERMS Contract Management, Contract Administration, Contract Dispute, Litigation, Alternative Dispute Resolution, ADR			15. NUMBER OF PAGES 124
			16. PRICE CODE
17. SECURITY CLASSIFICATION OF REPORT Unclassified	18. SECURITY CLASSIFICATION OF THIS PAGE Unclassified	19. SECURITY CLASSIFICATION OF ABSTRACT Unclassified	20. LIMITATION OF ABSTRACT UL